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Supreme Court of the United States

October Term, 1997

COUNTY OF STANISLAUS, a public entity; and MARY GROGAN, an individual; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC GAS & ELECTRIC COMPANY; PACIFIC GAS TRANSMISSION COMPANY and ALBERTA & SOUTHERN GAS COMPANY, LTD.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL H. KRAUSNICK
COUNTY OF STANISLAUS
Administration Building
1110 H Street
Modesto, CA 95354
(209) 525-6376

JOSEPH W. COTCHETT
BRUCE L. SIMON*
COTCHETT & PITRE
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

FRANK C. DAMRELL, Jr.
LISA L. GILLISPIE
DAMRELL, NELSON, SCHRIMP,
PALLIOS & LADINE
1601 I Street, Fifth Floor
Modesto, CA 95354
(209) 526-3500

Attorneys for Petitioners

* *Counsel of Record*

11788

QUESTION PRESENTED

Where, in violation of the antitrust laws, a monopoly utility voluntarily decides to purchase its imported natural gas supplies almost exclusively from an affiliated company who contracted with an illegal cartel, to the exclusion of lower-cost sources, does the fact that the United States Economic Regulatory Administration (ERA) had *permissively* approved the volume of natural gas imported from Canada conclusively establish the reasonableness of the utility's decision to purchase from only one available source, such that the "filed rate doctrine" bars any antitrust challenge to the utility's conduct?

PARTIES TO THE PROCEEDING

The parties identified in the caption were the only parties to the proceedings below. Petitioners have no knowledge of the existence of the "Ron Demirdjian" who appears as a plaintiff-appellant on the caption of the opinion of the Court of Appeals for the Ninth Circuit and at the reported decision at 114 F.3d 858, and believe the printing of that name was a typographical error by the Court of Appeals.

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Mary Grogan, an individual, and County of Stanislaus, a public entity, the plaintiffs in the District Court and the appellants in the Court of Appeals, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 114 F.3d 858 (9th Cir. 1997) and is reprinted as Appendix A to this Petition ("App. A"). The memorandum opinion of the United States District Court for the Eastern District of California on defendants' Motion to Dismiss is not published and appears as Appendix B to this Petition. The judgment entered thereon appears as Appendix C.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered an order denying a petition for rehearing with suggestion for rehearing *en banc* on July 15, 1997. The order denying the petition for rehearing is reprinted as Appendix D to this Petition. On October 4, 1997, Justice O'Connor extended the time within which to file the petition for writ of certiorari up to and including November 12, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes and regulations involved are set forth in Appendix E to the Petition ("App. E"). Additional regulatory decisions and orders previously cited to the District Court and Court of Appeals appear in the Clerk's Record before the Ninth Circuit ("CR").

STATEMENT OF THE CASE

The question in this case is whether the "filed rate" or *Keogh* doctrine[1] shields a public utility's voluntary, discretionary and unmandated selection of its sources of imported energy from antitrust review.

The filed rate doctrine provides that a court presiding over an antitrust case should defer to determinations and orders of the regulatory agency governing the same conduct. *See Keogh v. Chicago Northwestern Ry. Co.*, 260 U.S. 156, 162–63 (1922). In the present case, the Ninth Circuit has required the court, when faced with an alleged antitrust violation by a public utility, to defer to a regulatory scheme which has not mandated that the utility make the purchasing decision challenged by the action.

In particular, under the Ninth Circuit's decision below, the Economic Regulatory Administration's permissive approval of a particular import of natural gas created a "penumbra" of antitrust immunity around the respondent's separate anticompetitive decision to buy its gas *from only one source*, even though the respondent was not compelled by the regulatory agency to choose that, or any other, source. Indeed, the regulatory agency in this case had also authorized the respondent to purchase from other, lower-cost sources; the respondent voluntarily chose to purchase the more expensive gas from its wholly-owned subsidiary, which contracted with a cartel of gas producers in Canada. The respondent's decision to buy virtually all of its Canadian gas from that one source was completely voluntarily, not under the order of the regulatory agency.

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1. The doctrine takes its name from *Keogh v. Chicago Northwestern Ry. Co.*, 260 U.S. 156, 162–63 (1922), which held that an antitrust action seeking treble damages brought by a private shipper against interstate carriers was preempted by regulatory oversight. The *Keogh* Court held that the shipper's right to a just and reasonable rate is limited to the rate approved by the Interstate Commerce Commission, to which Congress had granted exclusive jurisdiction over determining the legality of rates.

However, under the decision below, so long as the gas that a utility imports is given permissive approval by a federal agency, the utility is licensed to violate the antitrust laws by opting to import all of its natural gas from only one source.

Public utilities were formerly subject to "well-head to burner-tip" regulation, such that if a court, following the *Keogh* rule, dismissed an antitrust action in deference to a state or federal regulatory scheme, it could be confident that comprehensive regulations existed and governed the utility's conduct. Under the former regulatory schemes, agencies protected ratepayers by ordering utilities to purchase natural gas from particular sources at particular prices. Under such a system, the filed rate doctrine protected the utility from being held liable in an antitrust action for doing nothing more or less than that which the regulatory agency had ordered it to do.

Over a decade ago, however, regulatory review of a utility's conduct changed. The agencies and Congress decided that regulatory oversight should be *permissive*, and that, in order to promote a new, competitive marketplace for energy, the regulatory agencies should give blanket approvals to all qualifying sources of natural gas, rather than have the agency make the utility's purchasing decision itself via an agency order.

Under the filed rate doctrine, the scope of the antitrust immunity afforded a utility should reflect the scope of the regulatory agency's authority over it. Instead, the Ninth Circuit has permitted a broad antitrust immunity to remain in place, notwithstanding the fact that the regulatory agencies no longer mandate the energy purchases which potentially expose the utility to antitrust scrutiny but, rather, give the utility discretion to choose its own energy sources.

In direct conflict with the Ninth Circuit view, the majority of

circuits, and this Court *in dicta*,[2] have agreed that the filed rate doctrine does not shield a utility's anticompetitive selection of energy sources, except where the utility has been *ordered* to select a particular source. Accordingly, this Court should issue a writ of certiorari to the Court of Appeals for the Ninth Circuit in this case.

A. Facts

Petitioners are individuals and entities who purchased natural gas from respondent Pacific Gas & Electric Company ("PG&E") between February 1988 and October 1993. The plaintiff class comprises two types of customers: core customers and non-core customers. Core customers are residential and commercial customers without alternate fuel capability; they must buy their gas from the monopoly utility. Petitioner Mary Grogan is the class representative for core customers. Non-core customers are large commercial and industrial consumers with alternate fuel capability, meaning that they are capable of purchasing their energy from sources other than PG&E. Petitioner County of Stanislaus is the class representative for non-core customers.

Respondent PG&E is a monopoly public utility company that supplies natural gas to millions of commercial and residential customers in northern and central California. Respondent Pacific Gas Transmission Company ("PGT"), a wholly-owned subsidiary of PG&E, owns and operates a gas pipeline that extends from the Canadian border to California. During the class period, PGT both transported natural gas from Canada into PG&E's service market in northern California, and sold the gas to PG&E. Respondent Alberta & Southern Gas Company, Ltd. ("A&S"), also a wholly-owned subsidiary of PG&E, is a Canadian corporation and an aggregator and exporter of Canadian natural gas.

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2. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 373–374 (1988).

During the class period, A&S entered into contracts with a group of natural gas producers from Alberta, Canada, pursuant to which A&S purchased gas and sold it to PGT. PGT, in turn, transported and sold the gas, which was the most expensive gas in Canada, to PG&E. These arrangements were the result of secret contracts between respondents and a cartel of Canadian natural gas producers, whereby PG&E agreed that it would purchase virtually 100% of its Canadian natural gas supplies from its wholly-owned affiliates at above-market prices to the exclusion of all other available, lower-cost Canadian supplies.

The purpose of the conspiracy, as explained in detail in petitioners' first amended complaint, CR 61, was to reduce an enormous corporate debt for PG&E's shareholders, owed to the Canadian producers, by passing off the repayment of such debt to California ratepayers. The Canadian cartel agreed to reduce this enormous corporate debt for PG&E, which was in the form of substantial take-or-pay ("TOP") obligations,[3] in exchange for PG&E's agreement to purchase virtually all of its Canadian natural gas supplies exclusively from the Canadian cartel at above-market prices until the debt was extinguished. *See generally*, CR 61.

PG&E asserts that because of the federal regulation of the natural gas industry, petitioners' challenge is barred by the filed rate doctrine. According to PG&E, because certain federal agencies regulate imported and interstate natural gas sales (including both volumes and rates), petitioners may not challenge PG&E's

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3. Pursuant to the conspiracy between PG&E and its subsidiaries and the cartel, A&S and the cartel entered into a series of long-term contracts. These contracts contained TOP provisions which obligated A&S to pay for a minimum quantity of natural gas, even if it did not take delivery of the gas. CR 61, ¶¶ 33, 44. As of 1984, the California market demand for natural gas had not been as great as PG&E had anticipated. Also, PG&E had failed to develop new gas markets outside of California. As a result, A&S had incurred billions of dollars of TOP penalties. CR 61, ¶¶ 28, 30, 35, 45–48.

anticompetitive natural gas purchasing decisions, *i.e.*, its decision to purchase its Canadian natural gas supplies almost exclusively from its wholly-owned subsidiary, A&S, and the group of Canadian producers, when less expensive Canadian supplies had *also* been approved for import by the federal agencies.

B. Proceedings Below

Petitioners filed their complaint seeking damages and injunctive relief against respondents PG&E and PGT on December 3, 1993, in the United States District Court for the Eastern District of California. CR 1. The Complaint asserted claims based upon violations of the Sherman Act (15 U.S.C. § 1, App. E at 75a), the Wilson Tariff Act (15 U.S.C. § 8, App. E at 75a), the Clayton Act (15 U.S.C. § 14, App. E at 76a), the California Cartwright Act (Cal. Bus. & Prof. Code § 16720) and the California Unfair Practices Act (Cal. Bus. & Prof. Code §§ 17200 *et seq.*).

Respondents moved to dismiss petitioners' complaint,[4] and subsequent first amended complaint, under Federal Rules of Civil Procedure 12(b)(6) asserting, *inter alia*, that petitioner's claims were barred by the filed rate and state action doctrines. CR 24, 77 and 78. After denying petitioners any discovery of the terms and conditions of PG&E's secret contracts with the Canadian producers, the District Court issued its Memorandum Opinion and Order dismissing the complaint and granting the motion to dismiss the first amended complaint without leave to amend. CR 124; App. B at 21a. The District Court essentially determined that regulation of the natural gas industry at the federal and state levels barred all of

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4. The District Court's memorandum opinion and order dismissing petitioners' initial complaint is published as *County of Stanislaus, et al. v. Pacific Gas and Elec. Co., et al.*, 1994-2 Trade Cases (CCH) ¶ 70,782 (E.D. Cal. Aug. 25, 1994). The memorandum opinion dismissing petitioners' first amended complaint, and the judgment thereon, are attached as Appendices B and C respectively.

petitioners' claims under the filed rate and state action doctrines. *See* App. B at 70a.

Relying solely on the filed rate doctrine, the Ninth Circuit upheld the District Court's dismissal, finding that petitioners' market preclusion claims[5] constituted a challenge to the quantity of gas that PG&E purchased from Canadian producers, and that because such quantities were approved by the Economic Regulatory Administration (ERA), petitioners' claims were barred as they "cannot overcome the filed rate doctrine's clear instruction that ERA-approved volumes are conclusively reasonable." *County of Stanislaus*, App. A at 13a. Furthermore, in addition to holding that ERA's approval of import volumes precluded the lawsuit's particular claims, the Court also concluded that such approval "forecloses *any* challenge to importation volumes." *Id.* at 13a (emphasis added).

According to the Ninth Circuit, *no one* can bring any challenge of any kind to an anticompetitive conspiracy between a domestic utility and a foreign supplier, the effect of which is to destroy competition for foreign energy sales to the domestic market. If the utility chooses to obtain its gas exclusively from its affiliated supplier abroad, even if lower-cost supplies are available and likewise approved for import by ERA, there can be *no challenge* to the utility's discretionary, voluntary and intentional purchase of the higher-cost supply. *Id.* at 13a.

The Ninth Circuit reached this conclusion relying almost exclusively on its interpretation of *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). *Id.* However, the Ninth Circuit ultimately considered *Nantahala* inapplicable to petitioners' claims

5. In the proceedings below, petitioners alleged claims both for price-fixing and for market preclusion. Petitioners do not contest the Ninth Circuit's holding that their price-fixing claims are barred by the filed rate doctrine. Instead, the error below was the Ninth Circuit's holding that petitioners' market preclusion claims are barred by the filed rate doctrine.

because *Nantahala* "concerned *rates*" while "this case concerns *volumes*. . . ." App A at 15a (emphasis in original).

Ultimately, the Ninth Circuit's decision turned upon whether the particular anticompetitive activity alleged by petitioners fell within the jurisdiction of a federal agency. Accordingly, a brief discussion of the history of the regulatory agencies with jurisdiction over the natural gas industry is necessary.

C. Scope of the Regulatory Scheme

Although the Ninth Circuit briefly addressed the Federal Energy Regulatory Commission's (FERC) review of the rates that PG&E paid to PGT for gas, the Court's decision turned on its interpretation of ERA's jurisdiction in approving natural gas import volumes.[6] *See County of Stanislaus*, App. A at 15a ("this case concerns *volumes*. . . ."). Neither agency, however, had mandated the particular *source* of the volumes purchased by PG&E, which is the gravamen of petitioners' claims for market preclusion, the anticompetitive conduct at issue.

In 1977, Congress created the Department of Energy (DOE). *See* Department of Energy Organization Act ("DOE Act"), Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified, as amended, primarily at 42 U.S.C. §§ 7101–7375 (1982)). The DOE administers section 3 of the Natural Gas Act ("NGA"), which permits the importation of natural gas unless it would "not be consistent with the public interest." *See* 15 U.S.C. § 717b, App. E at 77a.

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6. Although in making its decision to affirm the District Court's dismissal of plaintiffs-petitioners' claims, it discussed three levels of federal and state agency review, the Ninth Circuit based its decision on two levels of federal review only: "For purposes of the filed rate doctrine, the two levels of federal review are sufficient to bar the claims — state and federal — that plaintiffs press in this action." *County of Stanislaus*, App. A at 11a.

Before 1977, the "public interest" determination was made by the Federal Power Commission, now known as FERC. After creation of the DOE in 1977, authority for enforcing section 3 of the NGA was transferred to the Secretary of Energy ("Secretary") under the DOE Act. *See* 42 U.S.C. §§ 7101 *et seq.*; 42 U.S.C. § 7151(b) (1983). The Secretary then delegated section 3 authority to the Economic Regulatory Agency, or ERA. *See* DOE Delegation Order No. 0204-54, 44 Fed. Reg. 56,735 (1979); DOE Delegation Order No. 0204-54, 43 Fed. Reg. 47,769 (1978).

Although ERA's authority to protect consumers and the public interest through section 3 of the NGA did not exist until its creation in 1977, as early as 1938, when it enacted the NGA, Congress established its goal in the natural gas industry of " 'protect[ing] consumers against exploitation at the hands of natural gas companies.' " *General Motors Corp. v. Tracy*, 519 U.S. __, 117 S. Ct. 811, 821 (1997) (quoting *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Indiana*, 332 U.S. 507, 520 (1947)).

In furtherance of Congress's goal of ensuring competition in the natural gas market and pursuing a "market-oriented" approach to natural gas imports,[7] beginning in 1984 and continuing to 1992, ERA routinely exercised its NGA section 3 power to issue blanket, "rubber-stamp" import authorizations to applicants. ERA's purpose in granting such blanket authorizations as a matter of course was to ensure that "applicants and their agents will face *competition*

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7. In 1984, Congress issued a policy statement setting the standard for ERA's review of natural gas imports. Under this standard, Congress directed ERA to "presume" that an import was competitive if it contained flexible terms, and to follow a "market oriented approach to the approval of gas imports" in furtherance of Congress's goal of promoting competition in the natural gas industry. *See* New Policy Guidelines and Delegation Orders from Secretary of Energy to ERA and FERC Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6684, 6687–88 (1984) (the "DOE Guidelines"); CR 100 (Tab 24).

from others obtaining the ERA authorizations. . . ." *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 847 F.2d 1168, 1177 (5th Cir. 1988) (emphasis added).

When it issued these blanket import approvals, ERA did not issue a *mandate* to natural gas customers stating that the customer was required to purchase its natural gas supplies from any particular applicant. Rather, the ERA import approvals were *permissive*, thereby allowing wholesale purchasers to choose which of the available imports they would purchase. *See Bonus Energy, Inc.*, 1 ERA ¶ 70,691 at pp. 72,665–66 (1987) (in approving natural gas imports, ERA presumes customer will purchase a particular supply of gas only if needed and priced competitively).

In 1992, Congress amended the NGA and issued a directive codifying the ERA's former practice of *assuming* that natural gas imports would necessarily be in the "public interest," because more available gas would presumably foster competition and lower prices for ratepayers. Pursuant to the amendments, Congress directed ERA to deem all gas imported from countries which were parties to the North American Free Trade Agreement (NAFTA) with the United States as *per se* in the public interest. 15 U.S.C. § 717b(c), App. E at 77a-78a. Accordingly, since 1992, Congress has formally ratified the ERA's practice of automatically approving all Canadian natural gas imports, without any inquiry into the secret contracts with the illegal cartel as alleged in petitioners' complaint below.

While ERA controls the *volume* of gas being imported into the United States, the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over interstate wholesale power *rates*. 16 U.S.C. § 824(b), App. E at 78a; *see also* 16 U.S.C. §§ 824d, 824e, App. E at 79a-80a. FERC's responsibility is to determine a "just and reasonable" rate for such power. 16 U.S.C. § 824d, App. E at 79a.

However, FERC does not review a wholesale purchaser's discretionary decision to purchase from one ERA-approved source of supply over another ERA-approved source of supply. *See Kentucky W. Vir. Gas Co. v. Pennsylvania Pub. Utls. Comm'n*, 650 F. Supp. 659, 669 (M.D. Pa. 1986), *aff'd*, 837 F.2d 600 (3rd Cir. 1988), *cert. denied*, 488 U.S. 941 (1988) (*Kentucky West I*). Once an import is approved by ERA, FERC may not redetermine whether such import is in the public interest.

Under this scheme of split authorizations, the regulatory agencies which oversee the natural gas industry approve several *possible* import sources of natural gas. Then, a utility's voluntary decision as to *which* of the possible sources to utilize is within its discretion. As set forth below, where a utility has chosen to purchase virtually all of its imported natural gas from one ERA-approved source, and has not been *ordered* to choose that particular source by any agency, the utility should not find shelter from the antitrust laws in the filed rate doctrine.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve a serious and multifaceted disagreement between the Ninth Circuit on the one hand, and this Court, at least four other circuits, five state courts, Congress, ERA and FERC on the other. The dispute is whether an antitrust challenge may be brought to a regulated utility's decision to purchase nearly all of its imported power from one particular, high-priced source. The Ninth Circuit has held that a public utility whose purchase *volumes* and *rates* have been approved by a federal agency is licensed to violate the antitrust laws in relation to its decision to purchase from only one *source*, even though lower-cost power is available from other import sources, all of which are also approved for purchase by the federal agency. On the other hand, the Courts of Appeals for at least four other Circuits, as well as several state courts, have published contrary decisions on whether the filed rate doctrine provides shelter in such a case.

This case also presents the Court with the opportunity to decide whether Congress intended, through the NGA and the delegation of authority to the ERA for approving natural gas imports, to deem all such imports as "conclusively reasonable," such that no challenge of any kind could be brought against such imports. If this petition for writ of certiorari is granted, this Court may decide whether Congress intended to deprive consumers throughout the country of the protections of the antitrust laws, where the utility from which the consumer has purchased its power has engaged in collusive and anticompetitive conduct with its affiliated foreign supplier and an illegal cartel.

Unless this Court grants this petition, utilities throughout the Ninth Circuit, and indeed throughout the country, may rely on Ninth Circuit precedent to engage in violations of the antitrust laws with their foreign suppliers with absolute impunity, thereby leaving U.S. consumers with no means of recourse — neither by a private antitrust lawsuit, nor even through an action brought by the United States Department of Justice. In this era of increasing deregulation, unless the Ninth Circuit's decision is reversed, there will be no antitrust review of public utilities' anticompetitive selection of energy import sources and no consumer protection from anticompetitive conduct in the national energy import industry such as that engaged in by PG&E.

I. THE WRIT SHOULD BE GRANTED TO RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER THE FILED RATE DOCTRINE SHIELDS A UTILITY'S VOLUNTARY, NON-MANDATED SELECTION OF ENERGY SOURCES.

A. Background of the Filed Rate Doctrine

The filed rate doctrine arises from this Court's decision in *Keogh v. Chicago Northwestern Ry. Co.*, 260 U.S. 156, 162–63 (1922), which held that an antitrust action seeking treble damages

brought by a private shipper against interstate carriers was preempted by regulatory oversight. The *Keogh* Court held that the shipper's right to a just and reasonable rate was limited to the rate approved by the Interstate Commerce Commission, to which Congress had granted exclusive jurisdiction over determining the legality of rates.

In *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), the Supreme Court first extended the filed rate doctrine to the energy industry. In *Montana-Dakota*, the Court held that the rate filed and approved by the Federal Power Commission, the predecessor to FERC, is a conclusively legitimate rate. *Montana-Dakota*, 341 U.S. at 251–252. Except for a narrow review of the Commission's order, the right to a reasonable wholesale rate is limited to the rate which the Commission filed or fixed. *Id.*

In federal court cases, the filed rate doctrine applies as a rule of administrative law, pursuant to which federal courts have no power to set rates other than those determined by FERC to be just and reasonable. *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. dism'd*, 502 U.S. 954 (1991) ("*NOPSI III*"). The Supreme Court has observed that the filed rate doctrine was "properly driven by the need to enforce the exclusive jurisdiction vested by Congress in FERC over regulation of interstate wholesale utility rates." *Nantahala*, 476 U.S. at 966. In the context of an antitrust action, application of the doctrine is driven by the same need. *See Keogh*, 260 U.S. at 162–163. However, as explained below, the *sine qua non* of the filed rate doctrine is a regulatory agency's mandate; if no regulatory agency has mandated the purchasing decision, the doctrine is not implicated.

B. The Ninth Circuit's Position in *County of Stanislaus*

The regulatory agencies governing PG&E's import and sale of natural gas *did not* mandate that the utility purchase its power

from a particular source. Thus, in *County of Stanislaus*, the Ninth Circuit was presented with a case in which the "regulated" utility was engaging in anticompetitive conduct in an unmandated aspect of its business.

However, the Ninth Circuit interpreted petitioners' claims to be, "at core, a challenge to the quantity of gas that PG&E purchased from Canadian producers," and since such quantities had received permissive ERA approval, the volumes were deemed "conclusively reasonable" such that "any challenge" to PG&E's purchasing decisions was "foreclose[d]." *County of Stanislaus*, App. A at 13a.

The Ninth Circuit made this far-reaching conclusion despite the fact that the ERA import approvals at issue were not mandatory, but rather gave PG&E discretion to choose its sources of natural gas. The court relied on no authority to support its conclusion that ERA had mandated that PG&E purchase its Canadian gas supplies from a particular source. The Ninth Circuit thus seriously mischaracterized the jurisdiction of the federal agencies charged with implementing the terms of the NGA, resulting in an abrogation of the antitrust laws in a significant portion of the natural gas industry, *i.e.*, the entire import market.

C. The Majority Circuit and State Position

At least four other circuits have concluded that the filed rate doctrine does not bar a challenge to a utility's voluntary decision to purchase a particular quantity of power from a particular source when other lower-cost supplies are available and have been approved by the regulatory agency. *See Kentucky W. Virg. Gas Co. v. Penn. Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988), *cert. denied*, 488 U.S. 941 (1988) ("*Kentucky West I*"); *Kentucky W. Virg. Gas Co. v. Penn. Pub. Util. Comm'n*, 862 F.2d 69 (3d Cir. 1988) ("*Kentucky West II*"); *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 911 F.d. 993 (5th Cir. 1990), *cert. dism'd*, 502 U.S.

954 (1991) ("*NOPSI III*"); *Appalachian Power Co. v. Public Serv. Comm'n of W. Virginia*, 812 F.2d 898 (4th Cir. 1987); *Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987).

At least five state courts have agreed that the filed rate doctrine does not apply to a utility's voluntary choice of its sources of gas or power. *See Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983); *General Motors Corp. v. Illinois Commerce Comm'n*, 574 N.E. 2d 650 (Ill. 1991); *Sinclair Machine Products, Inc.*, 498 A.2d 690 (N.H. 1985); *Gulf States Utils. Co. v. Public Util. Comm'n*, 841 S.W. 2d 459 (Tex. App. 1992); *Pennsylvania Power Co. v. Pennsylvania Pub. Util. Comm'n*, 561 A.2d 43 (Pa. Commw. Ct. 1989), *aff'd*, 587 A.2d 312 (Pa. 1990), *cert. denied*, 502 U.S. 821 (1991).

This Court has supported the conclusions reached by these circuit and state courts *in dicta* in two separate cases. *See Nantahala*, 476 U.S. 953; *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) ("*MP&L*").

In each of the above cases, the courts have concluded that the filed rate doctrine will not prevent a party from bringing a challenge to a utility's purchasing decisions, when such decisions are made voluntarily and not pursuant to a mandate from the regulatory agency. These cases have all turned on the issue of a mandate — where the agency has *ordered* a utility to purchase a particular quantity of power from a particular source, there can be no challenge to that purchase under the filed rate doctrine. If, however, the utility's purchasing decision is voluntary, and even intentional in its implementation of an anticompetitive scheme, the bar of the filed rate doctrine will not apply, except under the new, erroneous rule established by *County of Stanislaus*, App. A at 1a.

D. The Application of *Nantahala* Exception

This Court, at least four circuit courts and five state courts have either rendered decisions or stated *in dicta* language that uniformly disagrees with the Ninth Circuit's interpretation of the *Nantahala* exception[8] to the filed rate doctrine.

This Court *in dicta* expressly stated that the filed rate doctrine would not bar the type of challenge brought by petitioners. In *Nantahala*, this Court examined the issue of whether the filed rate doctrine barred a state public utilities commission's challenge, through a retail rate-making proceeding, to an electric utility's purchase of a specific quantity of high-cost power from a specific source which had been mandated by FERC. Since a FERC mandate was involved in *Nantahala*, this Court was not presented with the issue of whether the state utilities commission could have brought a challenge to the electric utility's purchasing decisions had the utility been given the option to purchase at a different quantity of power from an alternate source:

> Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility **from a particular source** could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price.

Nantahala, 476 U.S. at 972 (boldface added, italics in original).

In *MP&L*, the Court addressed facts similar to those addressed in *Nantahala* that "are not distinguishable in any way that has relevance to the operation of the [filed rate doctrine]." *MP&L*, 487

8. The exception is also known as the "*Pike County* exception." *See Pike County*, 456 A.2d at 735.

U.S. at 372. As in *Nantahala*, since it involved a FERC mandate that the electric utility purchase a specific quantity of power from a particular source, the *MP&L* Court did not address on the merits the issue left open in *Nantahala*. The *MP&L* Court did, however, clarify its *dicta* in *Nantahala*:

> As we assumed, *it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power*, even at FERC-approved rates, if it had the legal right to refuse to buy that power.

MP&L, 487 U.S. at 373–74 (emphasis added). The *MP&L* Court further explained that the agency's *orders* were the determinative facts in both cases:

> Both cases concern **FERC orders** adjusting in the interest of fairness voluntary allocations of power among related entities. *Nantahala* involved a **FERC order fixing** the utility's right to acquire low-cost power; this case involves a **FERC order fixing** MP&L's obligation to acquire high-cost power. In *Nantahala* FERC had "determined that Nantahala's average cost of power obtained from TVA should be based on a **particular allocation** of entitlement power, *and no other*"; in this case FERC has determined that MP&L's cost of power obtained from Grand Gulf should be based on a **particular allocation**, and no other. In *Nantahala* the state court attempted to approve retail rates based on the assumption that Nantahala was entitled to more low-cost power than FERC had allocated to it. Here the state court seeks to permit the State to set rates based on an assumption that MP&L is obligated to purchase less [high-cost] Grand Gulf power than **FERC has ordered it to purchase**.

MP&L, 487 U.S. at 372–73 (citations omitted) (boldface added; italics in original). Through the Supremacy Clause, the filed rate doctrine precluded the state utility commissions in both cases from challenging FERC's *mandated* power allocations. *Nantahala*, 476 U.S. at 971–73; *MP&L*, 487 U.S. at 372–74.

Thus, the question raised by petitioners' claims — whether a challenge may be brought to a utility's decision to purchase high-cost power from a particular source when other less expensive supplies were also approved by ERA — was supported by both the *Nantahala* and *MP&L* Courts *in dicta*, and was specifically left open to be decided on another day. That day has come.

The Ninth Circuit correctly acknowledged in its opinion that this Court in *Nantahala* left open an important question concerning a utility's energy purchases. *County of Stanislaus*, App. A at 14a. However, the Ninth's Circuit's interpretation of *which* issue that was left open resulted in the Court rendering a decision in conflict with both *Nantahala* and *MP&L*.

In *County of Stanislaus*, the Ninth Circuit erroneously concluded that the determinative issue in *Nantahala* was whether FERC-approved rates were involved:

> The question not answered in *Nantahala* concerned *rates* filed with FERC, whereas this case concerns *volumes* filed with ERA. The difference is critical, and fatal to plaintiffs' . . . claims; because the volumes in the instant case had received ERA approval, they — like the filed rates in *Keogh* — are *conclusively reasonable*, and not subject to the challenge that plaintiffs raise. *Nantahala* concerned action by FERC only; here, because, along with FERC price approval, PG&E filed the particular quantity purchased with ERA, the quantity was conclusively reasonable, and the *Nantahala* exception is not applicable.

County of Stanislaus, App. A at 15a (citations omitted, emphasis in original). The Ninth Circuit erroneously concluded that because rates and volumes had been approved by federal agencies (FERC and ERA, respectively) in petitioners' case, and rates and volumes had been approved by a federal agency (FERC) in *Nantahala*, petitioners' challenge was barred by the filed rate doctrine just as the challenge in *Nantahala* had been barred.

However, the critical issue in both *Nantahala* and *MP&L* that the Ninth Circuit misunderstood was whether the federal agency — regardless of whether it was FERC or ERA — had *ordered* the utility to purchase the particular quantity of power from a particular source.

Further, the Ninth Circuit's finding that the critical issue in this case turned on whether FERC-approved rates were involved again demonstrates how the Court's holding essentially abrogates the *Nantahala* and *MP&L* Courts' conclusions. Whether the rates had been approved by FERC was a neutral factor in those Courts' decisions. *See Nantahala*, 476 U.S. at 972 ("a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, *even though the higher cost power actually purchased is obtained at a FERC-approved and therefore reasonable price*") (emphasis added); *MP&L*, 487 U.S. at 373–374 ("*it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates*, if it had the legal right to refuse to buy that power.") (emphasis added). By misunderstanding this critical distinction, the Ninth Circuit's decision directly conflicts with this language in these Supreme Court decisions.[9]

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9. The Ninth Circuit apparently became further confused as to the importance, or lack thereof, of whether the agency involved was FERC or (Cont'd)

The four other circuits that have addressed challenges to a utility's purchasing decisions have all disagreed with the Ninth Circuit on this point. Those circuits instead have applied the *Nantahala* exception in a manner uniformly consistent with the Supreme Court's application in both *Nantahala* and *MP&L*, and in a manner uniformly inconsistent with the Ninth Circuit's application.[10] *See Kentucky West I*, 837 F.2d at 607–09 (Third Circuit found challenge to utility's choice to purchase from higher cost supply was *not* barred by filed rate doctrine, as no interference with jurisdiction of FERC); *Kentucky West II*, 862 F.2d at 71, 73–74 (Third Circuit found *Nantahala* exception did not apply, as critical factor was that FERC had mandated that utility purchase power from particular source through minimum bill provisions; in such a case, utility could not have chosen to purchase from an alternative source of supply); *NOPSI III*, 911 F.2d at 1000–02 (Fifth Circuit relies upon *Nantahala* exception to filed rate doctrine to uphold state utility commission's decision to deny utility retail rate

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(Cont'd)

ERA, or both. What is important for purposes of correctly applying this Court's language and reasoning in *Nantahala* is not identifying which agency approved the quantity and source of power purchased. Rather, the important issue is whether that agency *mandated* the challenged purchase. In petitioners' case, PGT's purchase from A&S was reviewed by ERA, whereas the purchase in *Nantahala* was reviewed by FERC. Different agencies are involved in the two cases merely because the former involved an international import transaction and the latter a domestic wholesale sales transaction.

10. Only one circuit, the Third Circuit in *Kentucky West I*, has actually addressed the question left open in *Nantahala* directly on its merits, as that case did not involve a mandated allocation of power from FERC, and, thus, the filed rate doctrine did not bar the challenge to the utility's purchasing decisions. *Kentucky West I*, 837 F.2d at 607–09. The Third Circuit in *Kentucky West II* and the other three circuits (the Fourth, Fifth and Eighth) which have addressed the issue have supported the *Nantahala* exception, but found it did not apply to the facts of the case, as in those cases FERC had *mandated* the allocations of power.

increase, because utility acted imprudently in incurring increased power costs by not diversifying its supply portfolio; decision by utility not to diversity had nothing to do with FERC's mandated allocation of power); *Appalachian Power*, 812 F.2d at 903 (Fourth Circuit found *Nantahala/Pike County* exception did not apply, as FERC's mandate that utility purchase power from particular source precluded utility from purchasing from any other source); *Arkansas Power & Light*, 829 F.2d at 1450 n.4 (Eighth Circuit found, in case based upon same facts as *MP&L* and *NOPSI III* — all three cases involved the Grand Gulf I nuclear power plant — that *Nantahala/ Pike County* exception did not apply, as FERC had mandated quantity and source of utility's purchase of power; utility could not have chosen to purchase from alternate source of supply).

Under these cases, the application of the *Nantahala* exception turned on whether the regulatory agency had *ordered* that the utility purchase its power from a particular source, or had *permitted* the utility to choose the source itself. On the facts of this case, the difference between a *mandated* choice of source and a *permissive* choice of source, which was noted by each of the courts above, is determinative. A utility which has been ordered to purchase power from one source may seek the shield of the filed rate doctrine. A utility which has been permitted to choose its own source must make its purchasing decisions in a manner consistent with the antitrust laws.

Several state courts that have addressed this issue have also rendered decisions disagreeing with the view of the Ninth Circuit and demonstrating their better understanding of the determinative issue here. *See Pike County*, 465 A.2d at 738 (no filed rate doctrine bar to state utility commission's denial of utility's pass-through of costs associated with FERC-approved rates, as utility was free to purchase lower-cost power available from another source; known as the "*Pike County*" exception); *General Motors*, 574 N.E. 2d at 658 (no filed rate doctrine bar to distributor's decision to incur

certain FERC-approved charges "when distributor had choice whether or not to incur the charge"); *Sinclair*, 498 A.2d at 704–05 (no filed rate doctrine bar to challenge brought against utility's decision to purchase power from particular source of supply under an agreement approved by FERC, where other alternatives were available); *Gulf States*, 841 S.W. 2d at 468–71 (no filed rate doctrine bar to state utility commission's denial of utility's pass-through of costs associated with FERC-approved rates, as such costs were voluntarily incurred); *Pennsylvania Power*, 561 A.2d at 51 (no filed rate doctrine bar to state utility commission's challenge to utility's purchasing decisions where "FERC did not mandate the particular purchase involved . . . or otherwise limit [the utility's] options for purchasing power. . . .").

Petitioners' petition for a writ of certiorari should be granted by this Court, and the Ninth's Circuit's decision reversed, in order to establish a uniform rule of law throughout the nation governing the application of the *Nantahala* exception to the filed rate doctrine. Because of the current disarray on the proper interpretation of the *Nantahala* exception, the many utilities throughout the Ninth Circuit (the largest Circuit in the country), and indeed throughout the nation, will be subject to varying interpretations of the law and will surely be tempted to rely on this discord to thumb their noses at the antitrust laws, all to the detriment of captive consumers. Such a result runs contrary to the dictates of Congress, federal agency orders, and Supreme Court and circuit court precedent, as well as that of several state courts.

II. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER THE NGA GIVES FEDERAL AGENCIES JURISDICTION TO REVIEW A UTILITY'S EXERCISE OF DISCRETION IN SELECTING ITS IMPORT SOURCES.

The Ninth Circuit held that

> because [PG&E's import] quantities had received ERA approval and authorization, [petitioners'] claims cannot overcome the filed rate doctrine's clear instruction that *ERA-approved volumes are conclusively reasonable.*

Id. at 13a (emphasis added).

Although correctly noting that application of the filed rate doctrine to ERA's jurisdiction is a matter of first impression, the Court further held that precedent from the Supreme Court, orders from ERA and FERC, and the Supremacy Clause required a finding that "*ERA approval establishes an import volume as conclusively reasonable and thereby forecloses any challenge to importation volumes.*" *Id.* (emphasis added).

Contrary to the Ninth Circuit's decision, Congress has expressly declared that the federal agencies responsible for implementing the provisions of the NGA do not have jurisdiction to review the prudence of a utility's discretionary natural gas purchases. *Kentucky West I*, 837 F.2d at 608. The legislative history of the NGA further demonstrates that Congress did not intend the federal agencies to comprehensively regulate the entire natural gas industry. *Id.* at 608 (citing H.R. 709, 75th Cong., 1st Sess. (1937)); *see also Interstate Natural Gas v. Federal Power Comm'n*, 331 U.S. 682, 690 (1947). In 1992, when it amended section 3 of the NGA, Congress made its intent clear that under automatic import

approvals, federal agencies do not have jurisdiction over a utility's decision to purchase gas from one source of supply over another or to determine the reasonableness of such a decision where such authority did not exist prior to the amendment:

> [A]utomatic approval, however, is not intended to modify the authority of the FERC or jurisdictional State commissions to review the prudence of purchased gas when a jurisdictional utility seeks to include the cost of such natural gas in rates subject to the jurisdiction of the appropriate State or Federal agency. The public interest finding in this new section of the Natural Gas Act accordingly does not alter the authorities of the FERC or State commissions previously available with respect to the prudence of natural gas purchases.

136 Cong. Rec. H11404 (daily ed. Oct. 5, 1992) (bipartisan statement).

The Ninth Circuit concluded that ERA had approved the volume of gas PG&E purchased from A&S. *County of Stanislaus*, App. A at 13a. However, the contract between PGT and PG&E reflected the elimination of "minimum take" and "minimum bill" provisions. Under the former, PG&E was required to physically take a certain amount of gas from PGT. Under the latter, PG&E was required to bill PGT for a certain amount of gas whether or not it was actually taken.

In 1984, FERC eliminated PG&E's minimum take obligation. Order 380-A, FERC Stats. & Regs. 1982-1985 ¶ 30,584 at p. 31,061 (1984), *aff'd*, *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). Then, in 1990, FERC eliminated PG&E's minimum bill obligation. *Pacific Gas Transmission Co.*, 50 FERC ¶ 61,067

at p. 61,128 (1990). As a result of both FERC orders, PG&E was free to purchase no gas at all from PGT or A&S, yet it purchased the most expensive gas in Canada almost exclusively from its wholly-owned subsidiaries.

Both ERA and FERC have expressly stated that they have no jurisdiction over PG&E's decision to purchase from one source of supply over another. *See* CR 100, Tab 2 *Re Pacific Gas Transmission Co.*, 1 ERA ¶ 70,591 at p. 72,386 (1985) (ERA does not require that any particular volume of Canadian gas be purchased by PG&E through PGT); *Cascade Nat. Gas Corp.*, 1 ERA ¶ 70,578 at p. 72,335 (1984) (ERA does not dictate source of importer's purchase); *Northwest Alaskan Pipeline Co.*, 1 ERA ¶ 70,580 at p. 72,346–47 (1984) (decision of natural gas utility as to which source of supply it will purchase is "a matter outside the ERA's jurisdiction"); *see also* Order 380-A, FERC Stats. & Regs. 1982–1985 ¶ 30,584 at p. 31,061 (FERC lacks power to review utility's choice of its source of imported natural gas); *Pacific Gas Transmission Co.*, 50 FERC ¶ 61,067 at p. 61,128 (same).

In order to promote competition in the marketplace for natural gas, it was ERA's policy to routinely grant blanket import authorizations. *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 847 F.2d 1168, 1177 (5th Cir. 1988). In fact, throughout the class period, February 1988 through October 1993, ERA approved numerous imports of Canadian natural gas from suppliers who provided lower-cost alternatives to PG&E's affiliates. *See, e.g., Salmon Resources, Ltd.*, 1 ERA ¶ 70,749 (1988); *Development Assoc., Inc.*, 1 ERA ¶ 70,765 (1988); *Amoco Energy Trading Corp.*, 1 ERA ¶ 70,772 (1988); *Kerr McGee Chem. Corp.*, 1 ERA ¶ 70,840 (1989).

The Ninth Circuit's decision was based upon its interpretation of ERA's jurisdiction over natural gas imports. As noted above, both ERA and FERC have expressly stated that they have no

jurisdiction to review the prudence of a utility's natural gas purchases or its discretionary and intentional decision to purchase from one source of supply over another. Thus, the Ninth Circuit's interpretation of the federal agencies' authority directly conflicts with ERA's own interpretation of its power, as well as several ERA orders describing its objectives in carrying out the terms of the NGA. Orders of FERC are also directly at odds with the Ninth Circuit decision. *See, e.g.*, Order 380-A, FERC Stats. & Regs. 1982–1985 ¶ 30,584 at p. 31,061.

Pursuant to this Court's decision in *Keogh v. Chicago Northwestern Ry. Co.*, 260 U.S. 156, 162–63 (1922), a vital underpinning of the Ninth Circuit's decision that plaintiffs-petitioners' antitrust claims were barred by the filed rate doctrine was its erroneous holding that Congress had given ERA and FERC jurisdiction to establish that PG&E's source selections are "conclusively reasonable." App. A at 13a. ERA and FERC simply do not have that jurisdiction. Accordingly, the Court should issue a writ to the Ninth Circuit to overturn its holding in *County of Stanislaus*.

CONCLUSION

The question presented here — whether the filed rate doctrine bars an antitrust action challenging a monopoly utility's decision, pursuant to an illegal, market-preclusive contract with its foreign supplier, to purchase virtually 100% of its imported supplies from a single source where lower-cost supplies are available and may legally be purchased — affects consumers throughout the country. The natural gas industry and, in fact, the entire energy market is becoming increasingly deregulated. As a result, a gap in the protection of competition in the industry, once filled by regulators, is widening. That gap traditionally has been filled by the courts through enforcement of the antitrust laws — until now. The Ninth Circuit has completely abrogated the antitrust laws in all cases

where a utility engages in anticompetitive conduct with its foreign natural gas suppliers. This is a result that no one agrees with — not the courts, not Congress, and not the regulatory agencies.

Unless this petition for a writ of certiorari to the Ninth Circuit is granted and the Ninth Circuit's decision reversed, utilities throughout the country will be free to rely on the Ninth Circuit's precedent to deprive millions of energy consumers of the protections of the antitrust laws. This Court should therefore grant the writ.

Respectfully submitted,

JOSEPH W. COTCHETT
BRUCE L. SIMON*
COTCHETT & PITRE
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

MICHAEL H. KRAUSNICK
COUNTY OF STANISLAUS
Administration Building
1110 H Street
Modesto, CA 95354
(209) 525-6376

FRANK C. DAMRELL, Jr.
LISA L. GILLISPIE
DAMRELL, NELSON, SCHRIMP,
PALLIOS & LADINE
1601 I Street, Fifth Floor
Modesto, CA 95354
(209) 526-3500

Attorneys for Petitioners

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 29, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COUNTY OF STANISLAUS, a Public Entity; MARY GROGAN; RON DEMIRDJIAN,
Plaintiffs-Appellants,

v.

PACIFIC GAS AND ELECTRIC COMPANY, a California Corporation; PACIFIC GAS TRANSMISSION COMPANY, a wholly owned subsidiary of Pacific Gas & Electric Company,
Defendants-Appellees.

No. 96-15275

D.C. No. CV-93-05866-OWW (DLB)

OPINION

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted
February 11, 1997—San Francisco, California

Filed May 29, 1997

Before: Melvin Brunetti, Ferdinand F. Fernandez, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

Appendix A

SUMMARY

Antitrust/Government Action

The court of appeals affirmed a judgment of the district court. The court held that the "filed rate doctrine" forecloses an antitrust challenge to the quantity of gas imported by a utility when a federal agency has approved the quantity.

Appellee Alberta and Southern Gas Company (A&S), a Pacific Gas and Electric Company (PG&E) subsidiary, was an aggregator and exporter of gas. A&S negotiated contracts with natural gas producers from Canada for the sale of gas to PG&E. At the United States border, A&S sold the gas to appellee Pacific Gas Transmission Company (PGT), also a PG&E subsidiary, which owned the pipeline that transported the gas to California. At the California border, PGT sold the gas to PG&E.

After review by Canadian agencies, the agreement for the import of gas from Alberta was subject to review by two federal agencies. The Economic Regulatory Administration (ERA) found that PGT's import arrangement was competitive and market responsive, and could be expected to remain so. The Federal Energy Regulatory Commission (FERC) reviewed the price that PG&E paid to PGT for the gas to ensure that the price was just and reasonable.

The California Public Utilities Commission (CPUC) retroactively reviews rates and the cost underlying those rates to ensure that the rates are just and reasonable.

Appellants, gas customers of PG&E, filed a class action antitrust suit against PG&E, A&S, and PGT, alleging price fixing and denial of pipeline access in violation of state and federal laws. There were two types of customers within the class: core customers, individuals and commercial customers who were without alternative sources, and non-core custom-

ers, large commercial and industrial consumers that were capable of purchasing gas from alternative sources.

FERC administered several programs to provide transportation rights on PGT's pipeline to non-core customers. Appellant County of Stanislaus, the non-core representative of the class, did not take advantage of the programs. A CPUC program ensured a consistent supply of gas to core customers while allowing some purchasing flexibility to non-core customers. The CPUC endorsed a PG&E strategy to maximize core election by non-core customers. The CPUC also implemented several programs designed to ensure transmission capacity for non-core customers. The County did not take advantage of those programs.

The district court dismissed the action, ruling that the filed rate doctrine barred all the claims for damages.

[1] The filed rate doctrine bars antitrust recovery by parties claiming injury from the payment of a filed rate for goods or services. The Supreme Court has acknowledged criticism of the doctrine, but has affirmed it as a guidepost at the intersection of the antitrust and interstate commerce statutory regimes.

[2] The customers argued that FERC-approved rates were the product of antitrust violations and sought damages as overcharge that resulted from the fixed prices. That was precisely what the filed rate doctrine prohibits.

[3] The filed rate doctrine also barred claims that the gas purchasing agreements operated to deny access to the PGT pipeline, such that the customers could not independently arrange to procure less expensive gas. The denial of access claims were a challenge to the quantity of gas that PG&E purchased from Canadian producers. [4] ERA approval established an import volume as conclusively reasonable and thereby foreclosed any challenge to importation volumes. The

customers could not complain that PG&E and PGT illegally "stuffed" their pipeline with cartel gas; ERA approval of those volumes of gas precluded any such complaint. [5] The filed rate doctrine is not limited to "rates" per se.

[6] The Supreme Court has left open the possibility that a claim concerning the quantity of power purchased might survive the filed rate doctrine when a *rate* has been filed with *FERC*. This case concerned *volumes* filed with *ERA*. That difference was critical and fatal to the customers' claims.

[7] The filed rate doctrine bars all claims—state and federal —that attempt to challenge a rate that a federal agency has reviewed and filed. FERC determined that PG&E's wholesale prices were just and reasonable and ERA established that PGT's proposed import volumes were in the public interest. The customers could challenge neither the price of the gas nor the volume of gas procured. It made no difference that the customers chose to bring some of their claims under state law.

COUNSEL

Frank C. Damrell, Jr., Damrell, Nelson, Schrimp, Pallios & Ladine, Modesto, California, together with Bruce L. Simon, Cotchett & Pitre, Burlingame, California, and Tony J. Tanke, Tanke & Willemsen, Belmont, California, for the plaintiffs-appellants.

Marie L. Fiala and M. Laurence Popofsky, Heller, Ehrman, White & McAuliffe, San Francisco, California, for the defendants-appellees.

OPINION

HAWKINS, Circuit Judge:

The issues in this appeal are at the intersection of federal regulation of interstate commerce and the antitrust laws. We

are asked to determine what interest must yield when federal regulatory review leads to allegedly anticompetitive behavior: specifically, whether federal review of natural gas importation, transportation, and sales precludes antitrust claims for behavior underlying or leading to the regulatory result. We hold that it does and therefore affirm the district court's dismissal of plaintiffs' claims.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs-appellants in this class action are individuals and entities who received natural gas ("gas") service from defendant Pacific Gas & Electric Company ("PG&E") from February 1988 through October 1993. Within the plaintiff class are two types of gas customers: core customers and non-core customers. Core customers, according to plaintiffs' complaint, "are residential and commercial customers without alternate fuel capability." Plaintiff Mary Grogan is the class representative for the core customers. Non-core customers, by contrast, are large commercial and industrial consumers that are capable of purchasing gas from alternative sources. The County of Stanislaus ("County") is a non-core customer.

Defendant-appellee PG&E is a public utility company that supplies natural gas to millions of commercial and residential customers in northern and central California. Defendant-appellee Pacific Gas Transmission Company ("PGT") is a wholly-owned subsidiary of PG&E. PGT owns and operates a gas pipeline that extends from the Canada-United States border to California. Defendant-appellee Alberta & Southern Gas Company ("A&S"), a Canadian corporation, also is a wholly-owned subsidiary of PG&E. A&S is an aggregator and exporter of Canadian gas.

During the time period relevant to this lawsuit, defendant A&S negotiated contracts with a group of natural gas producers from Alberta, Canada, for the sale of gas to PG&E. Plaintiffs allege that the Alberta producers acted as a cartel, and

that A&S and the cartel conspired to increase the price paid for gas above the prevailing market rate for Canadian gas.[1]

At the United States border, A&S sold the gas to defendant PGT, which owned the pipeline that transported the gas to California. At the California border, PGT sold the gas to PG&E. In addition to the price-fixing conspiracy, plaintiffs contend that defendants prevented PG&E's competitors from gaining necessary access to PGT's pipeline. Plaintiffs allege that PG&E purchased excessive quantities of cartel gas in order to "stuff" the pipeline and prevent competitors from supplying gas to non-core customers in California. Plaintiffs further allege that PG&E caused its Utility Electric Generation Department ("UEG") to elect core service, which effectively filled the pipeline and foreclosed access for non-core customers.

Plaintiffs assert the following claims for relief: (1) price fixing in violation of section 1 of the Sherman Act, the Wilson Tariff Act, section 3 of the Clayton Act, and California's Cartwright Act; and (2) denial of pipeline access in violation of the Sherman Act, the Wilson Tariff Act, the Clayton Act, and California's Cartwright Act.[2]

Several levels of federal and state review scrutinized the gas purchase and transportation process described above. After review by Canadian agencies, the agreement for the import of gas from Alberta was subject to United States

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[1]A&S based the price it paid for gas on a "netback" formula, which arrives at a price by subtracting the cost of transportation from Alberta to California from the price of gas produced in the southwestern United States and transported to California. This is one of only two methods of price calculation that the Canadian regulatory structure permits. The other permissible method of price calculation requires the parties to submit to arbitration.

[2]The remaining claims — claims for injunctive relief — became moot when the contracts expired in October 1993 and are not before us on this appeal.

agency review. Two federal agencies regulate natural gas imports and sales: the Economic Regulatory Administration ("ERA") and the Federal Energy Regulatory Commission ("FERC").

Under section 3 of the National Gas Act ("NGA"), ERA reviews foreign natural gas imports and must approve a proposed importation of natural gas unless the import "will not be consistent with the public interest." 15 U.S.C. § 717b(a). ERA considers the competitiveness of the imported gas, the need for the gas, and the security of the gas supply. Pursuant to Department of Energy policy, the "primary consideration" is the "competitiveness of an import arrangement in the market served." *Pacific Gas Transmission Co.* [*PGT II*], 1 E.R.A. ¶70,591 at 72,386 (1985). In a series of orders, ERA first granted conditional, then final approval to the proposed sale and importation from A&S to PGT. *See id.*; *Pacific Gas Transmission Co.* [*PGT I*], 1 E.R.A. ¶70,574 at 72,321 (1984). ERA found that "PGT's import arrangement is competitive and market responsive, and can be expected to remain so over the term of the underlying contract." *PGT II* at 72,386.

In addition to ERA review, sections 4(c) and (d) of the NGA require sellers of natural gas in interstate commerce to file their rates with FERC. 15 U.S.C. §§ 717c(c), (d). In this case, FERC reviewed the price that PG&E paid to PGT for the gas to ensure that the price was "just and reasonable." 15 U.S.C. § 717c(a). Though FERC may not redetermine the reasonableness or competitiveness of an import arrangement approved by ERA, it must independently ensure that Canadian and domestic sources of gas receive equal treatment. *See Transcanada Pipelines Ltd. v. FERC*, 878 F.2d 401, 407, 411 (D.C. Cir. 1989).

Moreover, FERC administers several programs that provide transportation rights on PGT's pipeline to non-core customers. For example, pipeline operators such as PGT could apply

to FERC for an individual certificate of public convenience and necessity to transport natural gas on behalf of a non-core customer. *See* 15 U.S.C. § 717f. Though the certificates received only limited use because of the administrative burden they imposed, PGT did obtain certificates for at least nine shippers during the 1980s. *Re Pacific Gas Trans. Co.*, 40 F.E.R.C. ¶ 61,193 at 61,622 n.29 (1987). The County does not allege that it ever sought access to PGT's pipeline pursuant to this program.

In 1985, FERC adopted the "blanket certificate" program, intended to provide customers with greater access to gas transportation. *See* 50 Fed. Reg. 42408 (1985). The program authorized interstate pipelines to transport gas in competition with their own gas on a first-come, first-served basis. *See* 18 C.F.R. §§ 284.1-284.9, 284.221 - 284.227. PGT employed a lottery system to offer access under the blanket certificate program and received bids from customers for transportation access far exceeding available pipeline capacity. The County does not allege participation in the lottery, nor does it allege impropriety by PGT in conducting the lottery.

Non-core customers may also seek access through a program known as the "Section 311" shipper queue. *See* 15 U.S.C. § 3371(a). Under this program, interstate pipeline operators can transport gas for certain customers by submitting tariffs to FERC for approval. Although PGT received approval in 1987 to act as a section 311 shipper, the County does not allege that it sought access to this program.

In addition to federal regulation, a California state agency regulates the rates that utilities charge within the state. The California Public Utilities Commission ("CPUC") retrospectively reviews rates and the costs underlying those rates to ensure that the rates are "just and reasonable." Cal. Pub. Util. Code § 451. The core/non-core distinction results from a 1986 CPUC program designed to ensure a consistent supply of gas for the core customers while allowing some purchasing flexi-

bility to non-core customers. *See Re New Regulatory Framework for Gas Utilities*, 22 C.P.U.C. 2d 491, 505 (1986). As part of the program, non-core customers could elect core service and be treated as core customers. *Id.* at 520-21.

Many PG&E customers chose to core-elect. In addition, PG&E elected core service for its UEG. As a result of the core-election program, non-core customers suffered a reduction in transportation capacity. In response to their complaints, however, CPUC determined that core election benefitted core and non-core customers by increasing PG&E's bargaining power with Canadian producers. *Re Natural Gas Procurement and System Reliability*, 30 C.P.U.C.2d 545, 558-60 (1988). Thus, CPUC endorsed a PG&E strategy to maximize core-election by its non-core customers.

CPUC nonetheless implemented several programs designed to ensure transmission capacity for non-core customers. In 1990, CPUC required PG&E to allocate a portion of its pipeline rights to non-core customers. In 1991, CPUC adopted a program that required PG&E to make available to non-core customers any transportation capacity in excess of that required to serve core customers. The County, a non-core customer, does not allege that it sought to take advantage of either of these programs.

After plaintiffs filed their initial complaint in this matter, defendants filed a Rule 12(b)(6) motion to dismiss, which the district court granted in part and denied in part. The district court granted plaintiffs leave to amend the complaint. Plaintiffs filed an amended complaint, which added A&S as a defendant. The district court granted defendants' renewed motion to dismiss on a number of grounds without leave to amend. We review plaintiffs' timely appeal de novo. *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc).

Appendix A

ANALYSIS

The district court, in ruling on defendants' motions to dismiss, held that the filed rate doctrine barred all of plaintiffs' claims for damages.

[1] Since the 1920s, the "filed rate" or "filed tariff" doctrine has barred antitrust recovery by parties claiming injury from the payment of a filed rate for goods or services. *Keogh v. Chicago Northwestern Ry. Co.*, 260 U.S. 156 (1922). The doctrine has been the target of criticism since its inception. Recently, the Supreme Court acknowledged criticism of the doctrine, but affirmed its vitality as a "rule [that] has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423 (1986).

In *Keogh*, a private shipper claimed that rates submitted to and approved by the Interstate Commerce Commission ("ICC") pursuant to the Interstate Commerce Act had been fixed by a conspiracy that violated the Sherman Act. The shipper alleged that, as a result of the conspiracy, the rates were "higher than the rates would have been, if competition had not been thus eliminated." *Keogh*, 260 U.S. at 160. The Supreme Court rejected the shipper's claim, agreeing with defendants that ICC approval of their rates conclusively established the rates as "reasonable and nondiscriminatory." *Id.* at 161.

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951), applied the filed rate doctrine to rates filed with the Federal Power Commission (FERC's predecessor) and rejected a claim that defendant's allegedly fraudulent conduct had led to illegal and unreasonably high rates. *See id.* at 251-52. The Court held that:

> the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except

> for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

Id.; *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-63 (1986) (describing *Montana-Dakota*). We apply the filed rate doctrine out of deference to a "congressional scheme of uniform . . . regulation." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981) Otherwise, we would impermissibly "usurp[ ] a function that Congress has assigned to a federal regulatory body." *Id.* at 582; *see also Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988); *Nantahala*, 476 U.S. at 964.

The filed rate doctrine applies both to federal antitrust actions and to state law causes of action relating to rates established by federal agencies. *See Arkansas Louisiana Gas*, 453 U.S. at 580. To permit recovery under state law would allow a state court (or a federal court applying state law) to undermine the authority of a federal agency, *id.* at 582, and would impermissibly contravene the Supremacy Clause. *See id.*

Here, the sale and transportation of natural gas from Canada to California cleared several levels of state and federal review: FERC reviewed the price that PG&E paid to PGT for the gas; ERA reviewed the import contract between A&S and PGT; and CPUC reviewed the retail prices that PG&E charged to its California customers. For purposes of the filed rate doctrine, the two levels of federal review are sufficient to bar the claims — state and federal — that plaintiffs press in this action.

Plaintiffs assert three types of antitrust claims: price fixing, "market preclusion" or denial of access, and state antitrust

claims. We conclude that the filed rate doctrine bars all claims in this case, and we address each type of claim separately.

A. Federal Price Fixing Claims

[2] Plaintiffs claim that defendants' FERC-approved rates were the product of antitrust violations, and seek as damages the "overcharge" that resulted from the fixed prices. This is precisely what the filed rate doctrine prohibits. As we recognized in *Cost Management Servs. v. Washington Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996), a claim for damages based on a filed rate would be too speculative, because it:

> would require a showing that a hypothetical lower rate should and would have been adopted by [FERC]. Whether or not the agency would have actually approved a different rate was a question best left to the agency itself, rather than the courts.

99 F.3d at 944.

Plaintiffs' complaint, which seeks treble damages on the ground that alleged antitrust activities caused plaintiffs to pay an inflated rate for their gas, asks for that which *Keogh* and its progeny will not allow; "an award of treble damages is not an available remedy for a [plaintiff] claiming that the rate submitted to, and approved by, [FERC] was the product of an antitrust violation." *Square D*, 476 U.S. at 422; *see also H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 488 (8th Cir. 1992) ("The filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue.").

Plaintiffs cannot meaningfully distinguish *Square D*, which concerned a Canadian conspiracy to fix rates for freight transportation occurring outside the purview of the ICC. *Square D*, 476 U.S. at 414. Plaintiffs in the instant case have character-

ized the activities of A&S and the alleged cartel as "beyond the U.S. border" and "outside the authority of domestic regulatory agencies." *Square D* rejected such a "narrow reading" of the filed rate doctrine, *id.* at 417 n.19, adhering to *Keogh*'s rule that antitrust damages are not available for claims based on filed rates. *See id.* at 422. The same result obtains here: the filed rate doctrine precludes antitrust claims seeking damages on the basis of filed rates.

B. Federal "Market Preclusion" Claims

[3] The filed rate doctrine also bars plaintiffs' claims that defendants' gas purchasing agreements operated to deny plaintiffs access to the PGT pipeline, such that plaintiffs could not independently arrange to procure less expensive gas. Plaintiffs' denial of access claims are, at core, a challenge to the quantity of gas that PG&E purchased from Canadian producers; because such quantities had received ERA approval and authorization, the claims cannot overcome the filed rate doctrine's clear instruction that ERA-approved volumes are conclusively reasonable.

[4] Application of the filed rate doctrine to ERA review is a matter of first impression. This case requires us to address a claim that the defendants' import practices — which had received ERA review and approval — detrimentally affected plaintiffs' ability to obtain less expensive natural gas. Guided by Supreme Court precedent, the complimentary jurisdiction of ERA and FERC, and the Supremacy Clause, we hold that ERA approval establishes an import volume as conclusively reasonable and thereby forecloses any challenge to importation volumes. As a result, plaintiffs in this litigation cannot complain that PG&E and PGT illegally "stuffed" their pipeline with cartel gas; ERA approval of those volumes of gas precludes any such complaint.

[5] In *Nantahala*, the Supreme Court applied the filed rate doctrine to a FERC-ordered allocation of power and con-

cluded that "the filed rate doctrine is not limited to 'rates' *per se*." 476 U.S. at 966. *Nantahala* involved a decision of the North Carolina Supreme Court, which had affirmed an allocation of power by North Carolina's Utility Commission ("NCUC") that differed from a prior FERC allocation. The *Nantahala* Court held, on the basis of the filed rate doctrine, that FERC's ordered allocation preempted a subsequent reallocation by NCUC. *Id.* at 972-73. According to the Supreme Court,

> The North Carolina court's ruling that Nantahala had purchased an unreasonably large quantity of high-cost power . . . conflicts with FERC's orders in the same manner as would a refusal to recognize a FERC-approved price as a reasonable cost for purposes of retail ratemaking.

Id. at 973.

[6] Just as the North Carolina court in *Nantahala* was powerless to reject FERC's allocation, we cannot allow plaintiffs' claims to proceed given ERA's authorization of PGT's import volumes as "just and reasonable."

Although plaintiffs correctly note that the Supreme Court in *Nantahala* left open the possibility that a claim concerning the quantity of power purchased might survive the filed rate doctrine,[3] plaintiffs' claims do not fall within this narrow

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[3]The Supreme Court in *Nantahala* did not entirely foreclose the possibility of a claim based on allocation:

> Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*.

476 U.S. at 972 (emphasis in original).

question. The question not answered in *Nantahala* concerned *rates* filed with *FERC*, whereas this case concerns *volumes* filed with *ERA*. The difference is critical, and fatal to plaintiffs' denial of access claims: because the volumes in the instant case had received ERA approval, they — like the filed rates in *Keogh* — are *conclusively reasonable*, and not subject to the challenge that plaintiffs raise. *See Montana-Dakota*, 341 U.S. at 251-52 (right to reasonable rate nothing more than the right to filed rate). *Nantahala* concerned action by FERC only; here, because, along with FERC price approval, PG&E filed the particular quantity purchased with ERA, the quantity was conclusively reasonable, and the *Nantahala* exception is not applicable.

Plaintiffs invoke a legion of cases in an attempt to bring their claims outside the filed rate doctrine, none of which has particular relevance here. Plaintiffs' reliance on *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3rd Cir. 1993) is misplaced. In *Lower Lake Erie*, steel companies, trucking companies, and dock companies filed suit against railroad companies, alleging that the railroads "conspired . . . to preclude potential competitors from entering the market of lake transport, dock handling, storage and land transport of iron ore." *Id.* at 1151. At issue in *Lower Lake Erie* was "whether the railroads' rate-making activity occurred within the legal framework of the [Interstate Commerce Act]." *Id.* at 1152. The district court in *Lower Lake Erie* dismissed, on the basis of the filed rate doctrine, the steel companies' claims "based on the allegation that, absent the conspiracy, these plaintiffs would have paid lower rates for costs associated with the transportation of ore." *Id.* at 1154.

The claims that survived dismissal in *Lower Lake Erie* have no relevance here. In that case, if the anticompetitive conduct had not occurred, an entirely new alternative — shipping by truck as opposed to rail — would have been available to the steel companies. The railroads' rates were only coincidentally implicated because "the steel companies were compelled to

continue to pay the railroad fixed rates." *Id.* at 1160. In the instant case, by contrast, no matter what the reality of the alleged anticompetitive behavior, plaintiffs here would still be paying PG&E's rates. That those rates could theoretically be lower is precisely what compels application of the filed rate doctrine. *Lower Lake Erie* simply is not relevant.

Similarly unhelpful to plaintiffs are *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224 (Ct. App. 1993), and *Clipper Exxpress v. Rocky Mountain Motor Tariff*, 690 F.2d 1240 (9th Cir. 1982). As explained in greater detail below, *Cellular Plus* concerns only state law causes of action and only those situations where no federal agency has exercised review. *See* 14 Cal. App. 4th at 1240-43. Because two federal agencies exercised regulatory authority in the instant case, *Cellular Plus* has no relevance, particularly to this federal cause of action.

Clipper Exxpress likewise involved a set of facts that renders it irrelevant to our present inquiry. The plaintiff in *Clipper Exxpress* sought damages based on allegedly anticompetitive activities of defendants that, for two years, prevented plaintiff from filing a proposed rate with the ICC. 690 F.2d at 1246. Two principal facts guided our decision not to apply the filed rate doctrine in *Clipper Exxpress*: (1) the rate, because known and ultimately approved, would not require a court to speculate as to damages; and, (2) the plaintiff had no remedy before the ICC. *Id.* at 1266-67. That simply is not the case here.

In the instant case, the only known rates are those that defendants filed with FERC, ERA, and CPUC. To determine the damages that plaintiffs seek would require us to engage in the speculation that *Keogh* and its progeny forbid. In addition, plaintiffs here sought to challenge defendants' rates before state and federal agencies; that they received unsatisfactory results does not permit a court to step in and fashion its own

remedy. The markedly different facts in *Clipper Exxpress* produced, appropriately, a markedly different result.

Finally, the three recent Ninth Circuit cases that plaintiffs contend have narrowed the filed rate doctrine have not done so in a manner helpful to their claims. *See Central Office Telephone, Inc. v. AT&T*, Nos. 94-36116, 94-36156, slip op. at 1795 (9th Cir. Feb. 26, 1997); *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 103 F.3d 1446 (9th Cir. 1996), as amended on denial of rehearing, Slip Op. at 3749 (April 3, 1997); *Cost Management Servs.*, 99 F.3d at 937.

Central Office Telephone involved a contract dispute. *See* slip op. at 1805-07. Defendant AT&T made promises that plaintiff claimed were not kept. We refused to apply the filed rate doctrine because "this case does not involve rates or rate setting." Slip op. at 1810. By contrast, the instant case *only* involves rates and rate setting, and requires that we apply the filed rate doctrine.

The unique facts of *Columbia Steel* prompted us to reject the defendant's attempt to invoke the filed rate doctrine. *See* 103 F.3d at 1465. An agreement between two electric utilities divided the city into exclusive service territories. The plaintiff steel company was a customer of one utility, Portland General Electric, and was thwarted in its efforts to receive power from the other utility, Portland Power and Light. *Id.* at 1454. We refused to apply the filed rate doctrine because the case did not present a situation of hypothetical rate speculation. As we noted in *Columbia Steel*,

> The conduct challenged in this case is *not* [Portland General's] refusal to sell electricity to Columbia Steel at a lower rate. Rather, the challenged conduct is the *non-competition agreement* that prevented Columbia Steel from buying electricity at [Portland Power's] lower rates.

Id. at 1465 (emphasis added). We cannot say the same for the conduct alleged here, which amounts to little more than a refusal to sell gas to plaintiffs at a lower rate.

Lastly, *Cost Management Services* does not rescue plaintiffs' claims. *Cost Management Services* involved application of the "competitor exception" to the filed rate doctrine, an exception not helpful to any plaintiffs to the present action. *See* 99 F.3d at 945. The competitor exception does not aid the County or other non-core customers, who, though they might have competed with PG&E to purchase gas, did not take advantage of any of the programs for alternative access that FERC and CPUC offered. By failing to seek such alternative access, non-core customers paid the same filed rates for gas as core customers paid and cannot claim injury from exclusionary conduct unrelated to these filed rates.

Our conclusion that the filed rate doctrine bars plaintiffs' denial of access claim receives additional support from plaintiffs' complaint, which seeks as relief damages based on the difference between the rate paid for gas — a filed rate — and the rate potentially available from other Canadian producers. In reality, though framed as a challenge to access, this claim, too, is little more than a challenge to rates that FERC approved and filed for gas that PG&E imported, especially in light of plaintiffs' failure to seek access to alternative suppliers of gas. The filed rate doctrine bars the denial of access claims.

C. State Law Claims

[7] As noted above, the filed rate doctrine bars *all* claims — state and federal — that attempt to challenge a rate that a federal agency has reviewed and filed. In the instant case, FERC determined that PG&E's wholesale prices were "just and reasonable," and ERA established that PGT's proposed import volumes were "in the public interest." Accordingly, plaintiffs can challenge neither the price of the gas nor the

volume of gas procured. It makes no difference that plaintiffs choose to bring some of their claims under state law; on the facts of this case, the filed rate doctrine acts to bar all the challenges that plaintiffs assert. *See Arkansas Louisiana Gas*, 453 U.S. at 580; *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981). The district court properly dismissed the state law claims as barred by the filed rate doctrine.

Nor does *Cellular Plus* salvage plaintiffs' state law claims. *Cellular Plus* distinguished *Keogh* and *Square D*, holding that California's Cartwright Act "need not be interpreted as narrowly as the Sherman Act." 14 Cal. App. 4th at 1241. *Cellular Plus* concerned cellular telephone rates in California and involved no federal agencies and no federally filed rates. *Cellular Plus* merely declined to create a state filed rate doctrine where rates filed with the CPUC were not subject to federal review. *See, e.g., id.* at 1242 ("the instant action pertains to the cellular telephone industry and the [CPUC's] regulatory authority . . . whereas *Keogh* and *Square D* dealt with the ICC's regulatory authority").[4]

Throughout its discussion of the filed rate doctrine, the *Cellular Plus* court emphasized the absence of "any California decision similar to *Keogh*" because *Cellular Plus* did not concern the preclusive effect of *federally filed* rates. *See id.* The rates in the instant case received two levels of extensive federal review, and that federal review gives rise to application of the filed rate doctrine. Moreover, the challenge in *Cellular Plus* was to the retail prices filed in California, over which CPUC had authority; in the instant case, plaintiffs challenge the wholesale price paid in Canada, a price reviewed by

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[4]The *Cellular Plus* court gave a litany of reasons for its decision not to follow *Keogh* and *Square D*, *see* 14 Cal. App. 4th at 1242, and though several of those reasons make clear that *Cellular Plus* is readily distinguishable from the instant case, the most salient reason is the total absence of federal review.

ERA, filed with FERC, and not subject to question by CPUC. *See, e.g., Nantahala*, 476 U.S. at 966 ("a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable"). We conclude that *Cellular Plus* simply has no relevance here.

CONCLUSION

We AFFIRM the district court's dismissal of all of plaintiffs-appellants' claims on the ground that the filed rate doctrine bars such antitrust challenges to federally reviewed and filed rates.[5]

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[5]In light of our determination that the filed rate doctrine bars all of plaintiffs' claims, we need not reach the merits of the other defenses that defendants have raised.

APPENDIX B — MEMORANDUM OPINION AND ORDER RE: DEFENDANTS' 12(B)(6) MOTION TO DISMISS FILED DECEMBER 13, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5866-OWW

COUNTY OF STANISLAUS, a public entity, and MARY GROGAN, an individual, on behalf of themselves, and all entities and persons similarly situated,

Plaintiffs,

v.

PACIFIC GAS & ELECTRIC COMPANY, a California corporation, PACIFIC GAS TRANSMISSION COMPANY, a wholly owned subsidiary of Pacific Gas & Electric Co., and ALBERTA AND SOUTHERN GAS COMPANY LTD., a wholly owned subsidiary of Pacific Gas & Electric Co. and a foreign corporation,

Defendants.

MEMORANDUM OPINION & ORDER
RE: DEFENDANTS' 12(B)(6) MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendants' motion to dismiss plaintiffs' amended complaint filed after the August 24, 1994, Memorandum Opinion deciding a prior motion to

dismiss the original complaint for failure to state a claim. The original Memorandum Opinion to the extent not inconsistent with this opinion is incorporated by this reference.

A. *Parties*

The plaintiffs in this class action are individuals and entities who received natural gas service from defendant Pacific Gas & Electric Company (PG&E) during the period from February 1988 through October 1993.[1] There are two alleged subclasses of plaintiffs: core customers and non-core customers.[2] "[C]ore customers are residential and commercial customers without alternate fuel capability." (Amended Complaint (hereinafter AC) at ¶ 15). Mary Grogan, an individual, is the class representative for core customers. Non-core customers are large commercial and industrial consumers that use more than 250,000 therms per year and are capable of purchasing gas from alternative sources. The County of Stanislaus (County) is the class representative for non-core customers, both who core elected and did not core elect. The County maintains all class members suffered common injury, denial of access to competitively priced Canadian gas.

PG&E is a public utility company that provides natural gas service throughout central and northern California. Defendant

1. Plaintiffs, motion for class certification was granted on August 25, 1994. *See* Memorandum Opinion & Orders Re: (1) Plaintiffs' Motion For Class Certification: (2) Defendants' Motion To Dismiss, at 10-14 (August 25, 1994) (hereinafter Mem. Op.).

2. Defendants correctly dispute the existence of a non-core subclass. They contend that the Court only certified the class of core customers and have filed a separate motion to decertify the noncore subclass, which is addressed by a separate memorandum opinion.

Appendix B

Pacific Gas Transmission Company (PGT), is a wholly-owned subsidiary of PG&E. PGT owns and operates a gas pipeline extending from the Canada-United States border to California. Defendant Alberta and Southern Gas Company (A&S), a Canadian corporation, is also a wholly-owned subsidiary of PG&E. It is an aggregator and exporter of Canadian natural gas.

B. *Plaintiffs' Allegations*

The Canadian province of Alberta holds large natural gas reserves. In the 1950s, PG&E constructed a pipeline between California and Canada so that it could purchase Canadian gas. (AC, ¶ 31). PG&E created A&S to purchase gas from producers in Alberta and to contract for transportation of the gas from Alberta to the Canadian border at Kingsgate, British Columbia.[3] At that point, PGT bought the gas from A&S and sent it through PGT's pipeline, which ends at the California state line. (AC, ¶ 32). Once the gas reached California, it was purchased by PG&E and sold to end users in the northern and central regions of the state.

A&S purchased gas from a pool of Alberta gas producers, which Plaintiffs allege acted as a cartel. (AC, ¶ 36-37). A&S did not negotiate individual contracts with each member of the cartel. Rather, the cartel negotiated a single price for all of its members, which was approved by a vote of the producers. (AC, ¶¶ 40, 59). The cartel required A&S to purchase a specified volume of gas. Under so-called "take-or-pay" provisions of the cartel contracts, if A&S did not purchase 90% of the contract

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3. A&S arranged to have NOVA, an Alberta corporation, transport the gas from Alberta to British Columbia. Within British Columbia, the gas was conveyed by ANG. (AC, ¶ 32).

volume on an annual basis, it had to pay the cartel for gas not taken. (AC, ¶¶ 43-44).

Plaintiffs allege that prior to 1984, A&S contracted to purchase quantities of natural gas in excess of the needs of the California market, as part of PG&E's corporate strategy to expand its market share. (AC, ¶¶ 43-44). However, A&S proved unable to meet its large purchasing obligations, allegedly because PG&E failed to develop markets outside California. Consequently, A&S incurred take-or-pay obligations. By July 1984, A&S's "total potential [take-or-pay] liabilities under existing cartel contracts exceeded approximately $2 billion." (AC, ¶ 45). According to Plaintiffs, "this huge potential obligation was a liability of PG&E shareholders and not California customers." (*Id.*).

In 1984, PG&E allegedly conspired with the cartel to renegotiate the cartel gas contracts. The renegotiated contracts reduced PG&E's existing and future take-or-pay obligations. Plaintiffs aver that in addition to reducing these obligations, the parties restructured them so that they would be paid off by California ratepayers.

In exchange for the reductions in take-or-pay obligations, A&S agreed to pay inflated prices for cartel gas. (AC, ¶¶ 53, 55). Plaintiffs allege that A&S contracted to buy gas at rates above the prevailing market rate for Canadian gas. The price A&S paid for cartel gas was based upon a "netback" formula. The "netback" price wan calculated by subtracting the cost of transportation from Alberta to California from the price of gas produced in southwestern United States and transported to California. (AC, ¶¶ 58). The cost of producing United States gas is significantly greater than the cost of Canadian gas

production. It is claimed that independent (non-cartel) Canadian producers were willing and able to sell gas to A&S at lower prices. (AC, ¶ 40, 42). PG&E allegedly failed to use its substantial economic base, and A&S failed to use its economic bargaining power as the largest single purchaser of natural gas in Canada, to negotiate lower prices. (AC, ¶ 55).

In addition to the price-fixing conspiracy, Plaintiffs contend Defendants prevented PG&E's competitors from gaining necessary access to PGT's pipeline. Deregulation of the natural gas industry made it possible for non-core users of natural gas to satisfy their fuel requirements by purchasing directly from producers. (AC ¶ 64). However, non-core consumers seeking to buy inexpensive Canadian gas needed access to PGT's pipeline to transport the gas to California. It is alleged that PG&E foreclosed pipeline access by filling it with expensive cartel gas earmarked for core customers. PG&E "stuffed" the pipeline by causing its Utility Electric Generation Department (UEG) to elect core service and encouraging other non-core customers to elect core service. The increase in demand for core service caused a corresponding increase in the volume of gas transmitted through PGT's pipeline. Consequently, non-core customers who wanted to purchase gas directly from producers were denied access to inexpensive Canadian natural gas because PGT's entire capacity was dedicated to supplying gas to core customers and those non-core customers who elected core service. Filling the pipeline with cartel gas also benefitted Defendants because it enabled them to consume excess gas that had been prepaid, but not taken, under the take-or-pay obligations.

The price-fixing conspiracy and the denial of pipeline access benefitted Defendants in three ways. First, in exchange for paying higher prices, PG&E was able to restructure its take-or-

pay obligations to "reduce or eliminate significant shareholder liabilities," at the expense of California ratepayers. (AC, ¶ 50). Second, the hundreds of millions of dollars that the cartel received annually in excess profits benefited A&S board members and officers, who allegedly had board memberships and ownership interests in cartel producers. (AC, ¶¶ 50-51). Third, PG&E, PGT, and A&S earned higher revenues and profits, "which resulted in larger annual bonuses and incentive packages for certain PG&E executives." (AC, ¶ 50).

Plaintiffs assert ten claims for relief. The first four claims relate to the alleged price-fixing conspiracy, Plaintiffs claim violation of Sherman Act section 1, the Wilson Tariff Act, Clayton Act section 3, and the California Cartwright Act. The fifth through eighth claims pertain to anticompetitive denial of pipeline access under the Sherman Act, Wilson Tariff Act, Clayton Act, and Cartwright Act. The ninth claim alleges violation of the California Unfair Business Practices Act. Plaintiffs' tenth claim seeks injunctive relief.

C. *Regulatory Structure and History*

Natural gas imports from Canada to the United States are subject to regulation by Canadian, federal, and State agencies. The first level of regulation is Canadian. Natural gas may not be removed from Alberta for resale unless there is a finding of producer support and the price has been calculated according to one of two approved methods. *See* Mem. Op. at 2-3 (discussing Canadian regulatory structure). The details of the Canadian regulatory structure are not relevant to this motion.

At the federal level, there are two agencies responsible for regulating natural gas sales. First, under section 3 of the National

Gas Act (NGA), the Economic Regulatory Administration (ERA) must approve the foreign natural gas imports. The ERA approves a proposed import unless it "will not be consistent with the public interest." 15 U.S.C. § 717b. In making this "public interest" determination, the ERA considers: the competitiveness of the imported gas, the need for the gas, and the security of the supply, *See TransCanada Pipelines Ltd. v. FERC,* 878 F.2d 401, 407 (D.C. Cir. 1989).

In addition to ERA oversight, Sections 4(c) and 4(d) of the NGA, 15 U.S.C. §§ 717c(c) and (d), require sellers of natural gas in interstate commerce to file their rates with the Federal Energy Regulatory Commission (FERC). Under § 4 (a) of the Act, 15 U.S.C. § 717c(a), the FERC will approve the rates charged by wholesalers of natural gas only if the rates are "just and reasonable." However, the scope of the FERC's review of wholesale prices for imported gas is limited. The FERC may not redetermine the reasonableness or competitiveness of an import arrangement approved by the ERA. *TransCanada Pipelines,* 878 F.2d at 407. In such instances the FERC's jurisdiction in limited to the classification of costs so that Canadian and domestic sources of gas are treated equally. *Id.* at 411; *Pacific Gas Transmission Company,* 64 F.E.R.C. ¶ 61,052, at 61,484.

California has its own regulatory agency, the Public Utilities Commission (CPUC), which has authority to regulate rates charged to the public by California utilities. The CPUC must approve all utility rates or rate changes. Cal. Pub. Util. Code § 454 (a) (West. Supp. 1995) . The CPUC applies a "just and reasonable" standard when examining proposed utility rates. Cal. Pub. Util. Code § 451 (West Supp. 1995).

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Plaintiffs' claims must be understood within the context of the regulatory review conducted by the ERA, FERC, and the CPUC. Much of the regulatory history pertaining to Plaintiffs' price-fixing claims was reviewed in the August 25, 1994 Memorandum Opinion which decided Defendants' prior motion to dismiss. Mem. Op. at 25-32. A brief review is necessary here, along with a more detailed examination of the regulatory activity applicable to Plaintiffs' pipeline access claims.

In 1984, PGT sought ERA approval of its new contracts with A&S. The renegotiated contracts contained a significant price reduction. They also reduced PGT's take-or-pay obligation and its minimum physical take obligation. Under the amended contract, the contracts were subject to semi-annual review. To determine if the PGT gas import agreements were in the public interest, ERA examined the volume of gas, base price, price adjustment, take-or-pay obligations, make up provisions, length of the contract, and other terms bearing on marketability of the gas. Mem. Op. at 27; *New Policy Guidelines and Delegation Orders*, 49 Fed. Reg. 6684, 6688 (1984),

The ERA permitted interested parties to intervene in the review process. The CPUC intervened on behalf of core and noncore California ratepayers in support of the renegotiated contracts. Of nineteen intervenors, six opposed ERA approval on the ground that the import price was not competitive in the California market. *Re Pacific Gas Trans. Co.*, 1 E.R.A. ¶ 70,574, at 72,322 (1984). Some intervenor objected to the volume proposed to be imported on the ground that future development of domestic gas supplies would be adversely affected. *Id.* However, ERA review and approval of the terms of the renegotiated contracts found these objections meritless:

The substantial reduction in PGT's take-or-pay

> obligations, the elimination of its minimum physical take obligations, the reduction in the price of the Canadian gas imported by PGT, and the flexibility provided by the semi-annual review and redetermination provisions amply demonstrate that PGT's import arrangement is competitive and market-responsive, and can be expected to remain so over the term of the underlying contract.

Final Order Granting Amendments to Authorization to Import Natural Gas from Canada, 1 ERA ¶ 70,591, at 72,386 (1985). The ERA's review of the contract between A&S and PGT did not include scrutiny of the producer contracts between A&S and the alleged cartel of Canadian gas producers. The terms of the producer contracts remain confidential. Plaintiffs do not suggest what provisions of the Canadian producer contracts with A&S may have any bearing on the complaint.[4]

Based upon its review of the import contract between A&S and PGT, the ERA authorized PGT to import up to 1,023 MMcf of Canadian natural gas per day at the current rate, subject to semi-annual price renegotiations. *Id.* To assure that the contract remained competitive, the ERA required PGT to file quarterly reports showing the quantity and price of gas purchased monthly. Upon each filing, intervenors had the opportunity to oppose changes. 1 ERA ¶ 72, at 386-87. PGT's import authorization ran through October 1993. On September 12, 1989, the ERA

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4. Plaintiffs have been denied discovery of the A&S Canadian producer gas contracts. Nowhere have plaintiffs described what "anticompetitive" provisions the A&S "cartel" agreements contain, other than to "fix a price" that plaintiffs allege exceeds the market. It is not alleged what interest the Canadian producers have in transportation rights to which plaintiffs claim pipeline access rights.

extended PGT's import authorization through October 31, 2005. *Pacific Gas Transmission Company*, DOE/FE Opinion and Order No. 387, 1 FE ¶ 70,371 at 71,422 (March 6, 1990).[5] However, PG&E and PGT terminated the import contracts with A&S in October of 1993. Since 1984, the ERA continuously approved PGT's gas import volumes and prides. Mem. Op. at 27.

The alleged anticompetitive conduct was also subject to FERC regulation. Because the international contract between A&S and PGT was regulated by the ERA, the FERC had no jurisdiction to review the reasonableness or competitiveness of the import price arrangement approved by the ERA. *TransCanada Pipelines*, 878 F.2d at 407. Nevertheless, the FERC administered several regulatory programs that provided transportation rights on PGT's pipeline to non-core end users of natural gas.

One such regulatory program enabled pipeline operators such as PGT to apply to FERC for an individual certificate of public convenience and necessity to transport natural gas on behalf of an end user. *See* 15 U.S.C. § 717f(c). The certificates were not widely used because they only authorized transportation of limited volumes to a specified location over a finite duration. Notice and a hearing was required for each requested certificate. *Id.* Nonetheless, PGT obtained certificates for at least nine shippers during the mid-1980s. *Re Pacific Gas Trans. Co.*, 40 F.E.R.C. ¶ 61,193, at 61,622 n.29 (1987). The County does not allege that it ever sought PGT pipeline transportation service.

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5. In 1989, the Department of Energy transferred authority over the natural gas import and authorization program from the ERA to the Office of Fossil Energy (FE). Delegation Order 0204-127, 54 Fed. Reg. 11436 (1989).

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In October, 1985, FERC adopted the blanket certificate program, which eliminated many of the restrictions associated with individual certificate of public convenience. *See* 50 Fed. Reg. 42408 (1985). The goal of the blanket certificate program was to provide end users (not PG&E) greater access to gas transportation. The blanket certificate authorized interstate pipelines to become "open access" transporters, obligated to transport gas in competition with their own gas on a first come, first served, basis. *See* 18 C.F.R. §§ 284.1-284.9, 284.221, *et seq*. Pipelines, such as PGT, that obtained a blanket certificate were only required to profile transportation if there was available capacity. 50 Fed. Beg. 42408, 42435 (1985).

PGT sought to participate in the blanket certificate program. PGT intended to provide, by lottery, interruptible[6] transportation service to the extent it was available. 40 F.E.R.C. at 61, 193. It received bids from 118 end users for transportation space far in excess of available capacity. FERC issued PGT a blanket certificate in July, 1990 upon a finding of enhanced competition in gas supplies and transportation rights, approving PGT's lottery. *Re Pacific Gas Trans. Co.*, 52 F.E.R.C. ¶ 62,075 (1990). The County does not allege participation in the lottery or impropriety in PGT's conduct of the lottery.

Another gas transportation option available to non-core end users was the so-called "Section 311" shipper queue. 15 U.S.C. § 3371(a), Under this program, interstate pipelines could obtain "self-implementing" authority to transport gas for certain end users by submitting tariffs to the FERC for approval. PGT

6. Interruptible transportation, as opposed to firm transportation, can be stopped at any time. Some end users cannot use interruptible transportation because their applications require a steady, reliable supply of natural gas.

received authorization to be a Section 311 shipper in 1987. *See* 40 F.E.R.C. ¶ 61,193; 48 F.E.R.C. ¶ 61,125 (approving modifications to tariffs in 1989). In 1992, the FERC issued Order No. 636, which required pipelines to broker their firm capacity rights. The County does not allege it sought access to this program.

In addition to the federal regulation of A&S and PGT by the ERA and the FERC, at the state level, the CPUC continuously reviewed and approved the 1984 restructuring of PG&E's long-term Canadian gas supply contracts with A&S. It found that the reductions in price and take-or-pay obligations were reasonable and that no customer cost increases resulted. CPUC Reasonableness Decision, at 39-46 (1991) (hereinafter Reasonableness Dec.).

In 1986, the CPUC restructured and actively regulated the natural gas procurement and transportation industry in California by segmenting natural gas consumers into two categories: core and non-core. Core customers are defined as residential and commercial consumers with no alternatives to purchasing gas from utilities while non-core customers are comprised of large consumers that have alternatives for fuel. The CPUC accorded core customers the highest priority for gas supply and transportation "because of their status as captive customers and their end-use characteristics." 22 C.P.U.C. 2d 491, 505 (1986). Non-core customers received a lower priority. However, they were permitted to elect core service if they wished. *Id.* at 505-06; 520-21. Otherwise, non-core customers could purchase gas and transportation from utilities, such as PG&E, on a "best efforts" basis or they could arrange their own gas procurement and simply purchase transportation from the utility. *Id.*

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Core election by non-core customers proved to be a popular program. Although some parties claimed that core election should be restricted, the CPUC determined that core election benefited both core and non-core consumers because it increased PG&E's bargaining power with Canadian producers. *Re Natural Gas Procurement and System Reliability*, 30 C.P.U.C. 2d 545, 558-60 (1988). The CPUC stated in its reasonableness decision that, "it was prudent for PG&E to maximize core election as a means to secure the benefits of competition for the captive core customers," Reasonableness Dec. at 59 (1991). Nevertheless, the CPUC criticized PG&E for its "failure to maximize the bargaining leverage which core election offered in negotiating with the A&S pool." *Id.* at 60. PG&E served both captive core and core elect customers from the same supply at the same gas cost. 37 C.P.U.C. 2d 583, 628 (1990).

PG&E significantly increased the size of the core program by choosing core service for its utility Electric Generation Department (UEG), a non-core customer that uses natural gas to generate electricity. Core election by UEG and other non-core users substantially increased the volume of gas transported on PGT's pipeline. Consequently, firm transportation capacity for non-core users who wished to purchase gas directly from Canadian producers was reduced. Some end users complained that the size of the core program prevented non-core customers from obtaining pipeline space. However, the CPUC determined that "to the extent that goals of open access and low cost reliable core service conflicted, [CPUC's] first priority was to safeguard core customers' interests." Reasonableness Dec. at 55. Nevertheless, in 1990 the CPUC limited UEG's election of core service of its annual requirements, declining to zero over four years. 37 C.P.U.C. 2d 87, 109 (1990); 41 C.P.U.C. 2d 668, 694 (1991).

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In 1990, the CPUC created the Customer Identified Gas (C1G) program, which required PG&E to allocate 250 MMcf per day of its firm capacity rights on PGT's pipeline to noncore customers. PG&E would purchase gas for a specific customer, transport the gas from Canada to California, and then resell it. CIG customers were given transportation priority equal to that of the core program. 37 C.P.U.C. 2d at 607, 610. In 1991, the CPUC adopted an interim capacity brokering program. Under this program, utilities were required to make available to non-core customers any transportation capacity in excess of that required to serve core customers. *See* 41 C.P.U.C. 2d at 681-82. The CPUC addressed contentions that core elections by PG&E's UEG prevented non-core customers from gaining pipeline access and found although reducing the volume of UEG core election increased the cost of gas for non-core customers, the CPUC's first priority was to safeguard core customers' interests and found the UEG election achieved lower prices for core customers. Reasonableness Dec. at 55, 59, 66-67.

Stanislaus County, the non-core class representative, does not allege that it sought transportation capacity through any of the FERC or the CPUC programs.

II. DISCUSSION

A. *Judicial Notice*

The parties request judicial notice of some 89 documents, totaling approximately 2,000 pages.[7] Federal Rule of Evidence 201 provides in pertinent part: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1)

7. Though voluminous, these documents are necessary, for the most part, to understanding and resolving the issues presented.

generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A court shall take judicial notice if requested by a party and supplied with the necessary information." Federal courts may "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." *U.S. ex rel Robinson Rancheria Citizens Council v. Borneo,* 971 F.2d 244, 248 (9th Cir. 1992) "[O]n a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment." *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

Plaintiffs and Defendants request judicial notice of three types of documents: (1) decisions of federal agencies, such as the ERA, OFE, and FERC; (2) decisions of the CPUC; (3) public records or governmental entities; and (4) decisions of Canadian regulatory entities. Decisions of federal and state agencies may be judicially noticed. *Nugget Hydroelectric v. Pacific Gas & Elec.*, 981 F.2d 429, 435 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 2336 (1993) (taking judicial notice of decisions of the CPUC); *Cunningham v. Litton Indus.*, 413 F.2d 887, 889 n.2 (9th Cir. 1969) (taking judicial notice of decisions of the Equal Employment Opportunities Commission). Likewise, the Court may properly take judicial notice or public records of the CPUC, and other governmental entities. *Mack*, 798 F.2d at 1282. Finally, the Court may take judicial notice of "authoritative sources of foreign law." *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412, 1424 & n.10 (9th Cir. 1989). The parties' requests for judicial notice of these documents are GRANTED.

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Defendants object to four of the items Plaintiffs seek to have judicially noticed: (1) testimony of Geoffrey Bellenger before the CPUC; (2) an Opening Brief filed by the Division of Ratepayer Advocates[8] (DRA); (3) a DRA Report on the Reasonableness of Gas and Electric operations and (4) portions of PG&E's Complaint for Injunctive and Declaratory Relief against the CPUC, filed December 21, 1994. As the Court previously held, testimony and pleadings submitted for judicial notice are hearsay and if objected to "will be considered for the fact that they exist an submitted, not for the truth of disputed assertions of fact or argument." Mem. Op. at 10; *see also Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (pleadings in other proceedings may not be judicially noticed for their truth). The Court takes judicial notice of these four documents for the fact that they exist, but not for the truth of the matters stated therein, except to the extent that the fourth document collaterally estops PG&E as a judicial admission.

B. *The Amended Price-Fixing Claims Are Barred By The Filed Rate Doctrine*

Defendants move to dismiss Plaintiffs' price-fixing claims on the ground that they are barred by the filed rate doctrine. Plaintiffs contend the filed rate doctrine does not apply to the price-fixing claims because: (1) these claims are premised on activity outside the jurisdiction of the relevant regulatory agencies; and (2) do not challenge the rate Defendants charged for gas, but rather their alleged "non-rate activity" that precluded market competition.

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8. The DRA is a statutorily-created advocate charged with representing public utility customers and subscribers in proceedings before the CPUC. Cal. Pub. Util. Code § 309.5 (West Supp. 1995).

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Under the filed rate doctrine, courts may not redetermine the reasonableness of rates filed with the appropriate agency. *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-78 (1981). The doctrine bars the imposition of treble damages when it is alleged that the rate filed with and approved by the relevant agency was the product of an antitrust violation. *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 422 (1986); *Keogh v. Chicago & Northwestern Railways Co.*, 260 U.S. 156, 163-64 (1922). Two principles guide the application of the filed rate doctrine in this case.

First, the scope of immunity from treble damages under the filed rate doctrine is defined by the reach of the federal agency's exclusive jurisdiction. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985) (rejecting defendants' claimed immunity under filed rate doctrine because the alleged antitrust activities were "beyond the scope of the ICC's jurisdiction"). Supreme Court decisions make clear that the doctrine is "a matter of enforcing the Supremacy Clause." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 964 (1986). It prevents the judiciary from usurping power that Congress assigned to a federal regulatory agency. *Id.* (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981). One of the considerations underlying the doctrine in "preservation of the agency's primary jurisdiction over reasonableness of rates." *Arkansas Louisiana Gas Co.*, 453 U.S. at 581-82. "The filed rate doctrine is not limited to 'rates' *per se*, but applies to any activity under the controlling agency's regulatory power." Mem. Op. at 15.

The filed rate doctrine may be asserted with respect to matters within the agency's jurisdiction, even if the agency did not make a determination on the issue that the plaintiff seeks to

raise in court. *Mississippi Power & Light v. Mississippi*, 487 U.S. 354, 374 (1988) (hereinafter *MPL*). ("The Mississippi Supreme Court erred in adopting the view that the preemptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings."). "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.* at 375.

Second, the filed rate doctrine applies even when it is alleged that the filed rate is the product of antitrust violations that were not investigated by the controlling agency. *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 415-17 (1986). It was alleged in *Square D* that five Canadian motor carriers conspired to fix the prices for freight transportation between Canada and the United States. *Id.* at 411-12. The plaintiffs maintained that the rates the carriers filed with the Interstate Commerce Commission violated the Sherman Act. They argued that the filed rate doctrine did not bar recovery of treble damages because the tariffs filed with the ICC "were not challenged in a formal ICC hearing before they were allowed to go into effect." *Id.* at 417. The Court rejected this argument, stating that:

> "The Court of Appeals, however, properly concluded that *Keogh* was not susceptible to such a narrow reading: "Rather than limiting its holding to cases where, as in *Keogh*, rates had been investigated and approved by the ICC, the Court said broadly that shippers could not recover treble-damages for overcharges whenever tariffs have been filed."

Id. at 417 n.19 (quoting *Square D Co. v. Niagara Frontier Tariff Bureau*, 760 P.2d 1347, 1351 (2d. Cir. 1985)).

Finally, the filed rate doctrine precludes the plaintiff in an antitrust suit from claiming speculative damages. To establish injury, the plaintiff would have to prove a hypothetical lower rate that would have been charged in the absence of the conspiracy and the acceptability of those rates to the appropriate regulatory agency. *Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 164 (1922).

The price-fixing claims for treble damages in the original complaint were previously found to be barred by the filed rate doctrine. Mem. Op. at 36-42. Plaintiffs concede that "the Amended Complaint does not alter the substance of Plaintiffs' price-fixing claims." Plaintiffs' Opp. at 6:7-8. The Court previously determined that Plaintiffs' price-fixing claims against PG&E and PGT seeking damages for the difference between the fixed price and the Canadian market price for gas purchased, were barred by the filed rate doctrine. No new arguments why the filed rate doctrine does not bar the price-fixing claims against PG&E and PGT are presented. Plaintiffs contend that A&S is not protected by the filed rate doctrine because it is outside the jurisdiction of the ERA, FERC, and the CPUC. By analyzing A&S as a free standing supplier, plaintiffs assert that A&S's Canadian contracts are not subject to regulatory oversight. However, the *Keogh* analysis as to PGT applies with equal force to A&S, the other party to the contract. Mem. Op. at 10, 32, 34. ERA approval of the import contract bars the claim that the price of gas sold by A&S pursuant to the contract violates the antitrust laws.

There are only three notable differences between the price-fixing allegations in the Amended Complaint and Plaintiffs' Original Complaint. The Amended Complaint does not specifically allege that inflated Canadian gas rates were passed

on to PG&E's customers "penny for penny." Nevertheless, this can be inferred from the allegation that the rate PG&E's customers paid consisted of the cost of Canadian gas and the cost of transportation from Alberta to California, because PG&E passes on its full gas costs to ratepayers. (AC ¶¶ 57-58); *Re Application of Pacific Gas & Elec. Co. for Authority to Adjust Its Elec. Rate,* at 5-6 (March 16, 1994). Next, Plaintiffs now allege the legal conclusion that the acts complained of in the Amended Complaint occurred outside the jurisdiction of the relevant regulatory bodies. (AC, ¶¶ 5, 53). This allegation is addressed below. Finally, Plaintiffs allege that non-core customers, as well as core customers, were injured by the price-fixing conspiracy. Plaintiffs' Opp. at 21:3-6. Non-core customers who elected core service stand in the same position as core customers; they purchased gas out of PG&E's core portfolio. *Re New Regulatory Framework for Gas Utilities*, 22 C.P.U.C. 2d 491, 531 (1986). With respect to the filed rate doctrine, the analysis is the same for core and non-core plaintiffs who core elected.

Plaintiffs argue that the filed rate doctrine does not apply to the conduct of Canadian corporations, such as A&S, because they are outside the regulatory jurisdiction of federal and state agencies. Defendants counter that A&S is protected by the filed rate doctrine because its gas contracts with PGT were approved by the ERA. Both the seller and the purchaser have a complete defense to antitrust liability if the sales price is the filed rate. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (buyer of natural gas protected by filed rate doctrine); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 248 (1951) (seller of electric power entitled to filed rate defense). Here, A&S sold gas to PGT at the rate approved by the ERA; the filed rate doctrine applies equally to A&S as seller, and to

PGT as buyer. *Square D Co. v. Niagara Frontier Tariff Bureau. Inc.*, *supra*, 476 U.S. at 414, 417. After agency approval of filed rates, even unregulated conduct which results in fixing the amount of the rate cannot be the subject of an antitrust complaint.

Plaintiffs' final argument is that application of the filed rate doctrine to this unique circumstance would extend the rule beyond its prior limits. They claim that even if the A&S-PGT, PGT-PG&E, and PG&E-customer rates were approved by federal and state agencies, the "heart" of the alleged price-fixing conspiracy is the agreement between A&S and the cartel of Canadian producers. This agreement was outside the reach of all the relevant regulatory agencies; neither federal nor state agencies reviewed the gas sales between A&S and the cartel.

Plaintiffs' argument fails for two reasons. First, the approved rate in the A&S-PGT contract is based upon the setback formula price A&S paid to the cartel and the cost of transportation from Alberta to the Canadian border. Hence, "the [ERA] reviewed the price of gas paid by A&S [to the cartel] as a component of the A&S-PGT international contract." (Mem Op. at 32). It is undisputed that ERA has jurisdiction to determine whether import prices for natural gas are competitive in domestic markets. One of the factors the ERA must consider is the price A&S paid to its suppliers, the cartel producers. In this antitrust suit, Plaintiffs ask the Court and ultimately a jury to substitute their judgment for that of the ERA, FERC, and CPUC as to the competitiveness of the price A&S paid "the cartel" for gas. This threatens to undermine jurisdiction that Congress gave to the ERA and runs counter to the very purpose of the filed rate doctrine. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 964 (1986) (purpose of filed rate doctrine is to enforce Supremacy Clause by ensuring that judiciary does not usurp authority Congress granted to a federal agency).

Second, Plaintiffs claim that the filed rate doctrine should not apply because the filed rate is the product of a foreign conspiracy, is not unique. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). In *Square D*, the plaintiffs alleged that five Canadian motor carriers conspired to fix prices for freight transportation between Canada and the United States. The carriers filed the allegedly fixed prices with the Interstate Commerce Commission (ICC). *Id.* at 412-13. The rates were never challenged before the ICC nor did the ICC ever explicitly determine the rates were proper. The plaintiffs' argument that the filed rate doctrine should not apply because "there was no ICC hearing in this case and [ ] *Keogh* did not involve allegations of [this] type of covert legal violations" was-rejected: [the rates were] "lawful," "in the same sense that rates filed in *Keogh* were lawful." *Id.* at 417 n.19. The filed rate doctrine applies to bar the price fixing claims.

The alleged "competitor exception" to the *Keogh* rule does not aid the County. The County does not claim to have been harmed by exclusionary conduct unrelated to the filed rate for gas, because non-core customers paid the same filed rates for gas that core customers paid. *See, e.g., In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1159 (3d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 921 (1994).

As in *Keogh*, Plaintiffs' claims require proof of a hypothetical rate for gas that would have been charged and approved by the ERA, FERC, and CPUC, absent the alleged conspiracy between A&S and the Canadian gas cartel. Plaintiffs argue at length about non-rate conduct, foreclosure of market and denial of access in an attempt to distinguish this case from the filed rate cases. No conduct of defendants in establishing the price paid for natural gas and in allocating transportation rights was independent from rate regulation on the federal and

state level. The price-fixing claims against PG&E, PGT, and A&S are barred by the filed rate doctrine. Defendants' motion to dismiss these claims is GRANTED without leave to amend.

C. *State Action Bars the Price-Fixing Claims Against PG&E*

The Court previously determined that Plaintiffs' federal price-fixing claims against PG&E were barred by the state action doctrine. (Mem. Op. at 47, 56-58). Defendants again move to dismiss these claims, arguing that the Amended Complaint does not plead new facts that defeat the state action defense and citing *California Retail Liquor Dealers Ass'n v. Medcal Aluminum, Inc.*, 445 U.S. 97 (1980). In substance the new complaint alleges PG&E conspired to pay the cartel an excessive price to benefit the cartel. (AC, ¶¶ 53-55; *e.g.*, AC, ¶¶ 83-84.) *See also Nugget Hydraulic L.P. v. Pacific Gas & Elec. Co.*, 961 F.2d 429, 434-35 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2336 (1993) (allegations of bad faith or anticompetitive notice do not avoid the state action doctrine).

Plaintiffs suggest the CPUC statutory scheme for regulation of natural gas prices and transportation is "at best neutral." However, the CPUC in the regulatory history, cited at p. 35 of the opposition memo, demonstrates its objective to utilize its regulatory oversight to achieve the policy of enhanced competition in gas markets. Plaintiffs provide no new authority to suggest that PG&E in its transportation arrangements with PGT, or in the price it paid PGT for gas purchases, or in the price PGT paid A&S, did not pass through penny for penny all such costs to PG&E; all of which is directly within the ambit of CPUC regulation.[9] As to the ADS contracts, plaintiffs do not

9. Plaintiffs contend that state action does not bar the claims against (Cont'd)

allege those contracts concern anything more than the price of gas, which may include a transportation charge, a subject that is comprehensively and actively regulated by the CPUC. Defendants' motion to dismiss the federal price-fixing claims against PG&E on the ground they are barred by the state action doctrine is GRANTED, with prejudice.

D. *The Filed Rate Doctrine Immunizes Defendants From The Pipeline Access Claims*

Defendants assert the filed rate doctrine immunizes them from antitrust scrutiny for the volumes of gas they imported through PGT's pipeline. Plaintiffs contend the filed rate doctrine is not applicable because it only extends to "related activity." They maintain the Defendants conspired to preclude competition by access to gas pipelines available to PG&E, which foreclosed non-core buyers from buying pipeline gas, and that this anticompetitive conduct is unrelated to gas rates. (AC, ¶¶ 67, 76-77). Defendants counter that the filed rate doctrine "applies to any matter that falls within the regulatory agency's plenary jurisdiction over rates." (Defs.' Mem. at 26:3-4). According to Defendants, the volumes of gas they imported were approved by the ERA.

"The filed rate doctrine is not limited to 'rates' *per se*, but applies to any activity under the controlling agency's regulatory power." (Mem. Op. at 15). Supreme Court decisions make clear that the doctrine is "a matter of enforcing the Supremacy

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(Cont'd)

PGT and A&S. Since Defendants do not move to dismiss the claims against PGT and A&S on the basis of state action, it is unnecessary to decide whether state action applies the price-fixing claims against PGT and A&S.

Clause." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 964 (1986). It prevents the judiciary from usurping power that Congress assigned to a federal regulatory agency. *Id.* (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981)). The scope of filed rate immunity is defined by the reach of the federal agency's exclusive jurisdiction. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985) (rejecting defendants' claimed immunity under filed rate doctrine because the alleged antitrust activities were "beyond the scope of the ICC's jurisdiction").

The filed rate doctrine may be asserted with respect to matters within the agency's jurisdiction, even if the agency did not make a determination on the issue that the plaintiff seeks to raise in court. *MPL*, *supra*, 487 U.S. 354, 374 (1988) ("The Mississippi Supreme Court erred in adopting the view that the preemptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings.") "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.* at 375.

Plaintiffs seek to limit the holdings of *Nantahala* and *MPL* to their facts. However, there is no principled basis for distinguishing those cases from this case. Here, no relevant conduct concerning gas price or volume occurred in Canada that was not reviewed under the ERA approval of the PGT-A&S, PGT-PG&E contracts.

Plaintiffs also argue that the filed rate doctrine does not apply here because Defendants engaged in "non rate-related"

anticompetitive conduct. However, the cases cited by Plaintiffs are consistent with the principles drawn from *Nantahala* and *MPL. In re Lower Lake Erie Iron Ore Antitrust Lit.*, 998 F.2d 1144, 1158-59 (3rd Cir. 1993); *Pinney Dock & Trans. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1456-57 (6th Cir. 1988). In *In re Lower Lake*, the plaintiffs alleged that a group of railroad companies conspired to prevent the development of new docking facilities. The claim that the defendants' anticompetitive acts resulted in unreasonably high rates for rail transport was dismissed under the filed rate doctrine. *In re Lower Lake*, 998 F.2d at 1154. Nevertheless, the claim that defendants restrained competition by placing unreasonable restrictions on the sale or lease of their dock space survived because this conduct "[did] not implicate the ICC's exclusive jurisdiction and therefore [was] not barred by *Keogh*." *Id.* at 1158. The Sixth Circuit reached a similar result in a analogous case, *Pinner Dock*, 838 F.2d at 1456-58. Although both of these cases analyze the scope of filed rate immunity in terms of "rate-related" verses "anticompetitive on-rate activity", *In re Lower Lake*, 998 F.2d at 1159; *Pinney Dock*, 838 F.2d at 1457-58, both the Supreme Court and the Ninth Circuit have stated that the touchstone for application of the filed rate doctrine is the extent of the reviewing agency's jurisdiction. *MPL*, 487 U.S. at 374, 380 (Scalia, J., concurring) ("What this case comes down to, then, is whether FERC's asserted jurisdiction . . . is supported by the provisions of the Federal Power Act."); *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985).

Defendants argue the ERA possesses jurisdiction to scrutinize the quantities of gas PGT purchased from A&S and the ERA did in fact approve the amounts PGT purchased. In so doing, the ERA determined the competitiveness of the import arrangement in the market to be served. Under Section 3 of the NGA, 15 U.S.C. § 717b, the ERA is required to authorize gas

imports unless the import "will not be consistent with the public interest." In making this public interest determination, the ERA considers the following factors: "the competitiveness of the imported gas, the need for it, and the security of the supply." *TransCanada Pipelines, Ltd. v. FERC*, 878 F.2d 401, 407 (D.C. Cir. 1989) (citing 49 Fed. Reg. 6684, 6690 (1984) (DOE Guidelines)). The DOE guidelines provide that "[t]he terms and conditions of the gas purchase contract, taken together, must provide a supply of gas that the importer can market competitively over the term of the contract." 49 Fed. Reg. 6684, 6688 (1984). "[T]he authorization of a given volume of gas at up to a particular price is a decision by the ERA that the particular import is in the public interest, and that no market failure has been shown that has or would interfere with the pipeline's acting in its own interest to acquire gas on the most favorable terms." *TransCanada Pipelines*, 878 F.2d at 407. The ERA also has authority to: consider a competitor's complaints re price and volumes in new purchase contracts; amendments to pricing and take provisions in existing contracts, and other competitive concerns. (See authorities collected at Reply Mem. at 13, n. 12-22).

The ERA approved PGT's contract to purchase gas from A&S. Final Order Granting Amendments to Authorization to Import *Natural Gas from Canada*, 1 ERA ¶ 70,591 (1985). In so doing, it specifically authorized PGT "to import up to 1,023 MMcf[10] of Canadian gas per day for the period November 1, 1985 through October 31, 1993." *Id.* at 72,387. The terms of this contract were subject to quarterly review by the ERA. *Id.* There is no merit to Plaintiffs' contention that the ERA did not

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10. PGT's capacity is 1,066 MMcf per day. Reasonableness Dec. at 98 (1991).

approve the volumes PGT agreed to purchase from A&S.[11] In fact, several domestic natural gas suppliers objected to the gas volumes PGT proposed to import. *Re Pacific Gas Trans. Co.*, 1 E.R.A. ¶ 70,574, at 72,322 (1984). These objections were considered and rejected. Plaintiffs' argument that PGT had discretion to purchase less misses the mark. Plaintiffs do not complain too little Canadian gas was imported. PGT was authorized to purchase "up to 1,023 MMcf"; if PGT did not purchase more than 1,023 MMcf per day, the filed rate doctrine applies. Plaintiffs do not allege PGT exceeded its purchase authority or that an excess volume was transported.

Although the ERA did not specifically address the potential anticompetitive effect of the authorized volumes on PGT's pipeline capacity, no objection to the PGT/A&S import contract was raised on that ground. *See id.* at 72,384-85; *id.* at 72,322-23. The ERA had jurisdiction to address these concerns. As in *MLP,* since the Plaintiffs did not raise these issues before the ERA, they are barred from collaterally attacking the ERA's decision through private antitrust litigation. *MLP,* 487 U.S. at 375. It cannot seriously be contended that the ERA as reviewing agency, did not have jurisdiction to determine the effect of the volume of natural gas imported by PGT. In approving gas import agreements the ERA had to " 'consider international trade policy, foreign policy, . . . national security interests,' and 'other factors as may be appropriate.' " *Panhandle Producers Royalty Owners Assign. v. ERA*, 822 F.2d 1105, 1107 (D.C. Cir. 1987).

Plaintiffs suggest that the ERA's authorization of the PGT-A&S gas contract does not provide a complete defense to their

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11. The ERA concluded, "POT's import competitive and market-responsive, and can be expected to remain so over the term of the underlying contract." Ado at 72,33

pipeline access claims because those claims involve "other allegations of wrongdoing," and "more than a mere challenge to the volume of gas purchased by defendants from the cartel," that the ERA did not address (*e.g.* the conspiracy between A&S and the cartel of Canadian gas producers to "stuff" PGT's pipeline with cartel gas so that independent Canadian producers could not sell gas to non-core users). However, the amended complaint alleges just that. (AC, ¶¶ 49, 64-65, 67, 69). Moreover, the ERA authorized the very conduct that Plaintiffs complain of — PGT's purchase of large quantities of Canadian gas, found to be consistent with the public interest. (Mem. Op. at 25-26).

Finally, Plaintiffs argue that the "*Pike County*" exception to the filed rate doctrine applies in this case. *See Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983) (holding state public utilities commission may review conduct of utility that falls outside jurisdiction of any federal regulatory agency); *see also Kentucky West Virginia Gas v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988). The *Pike County* exception has not been applied to permit private antitrust actions brought by utility ratepayers, (Mem. Op. at 20). Even if *Pike County* were extended to private enforcement actions, it would not apply here because Plaintiffs do not seek review of conduct that falls outside the jurisdiction of the relevant regulatory agencies, but rather they seek court antitrust review of regulatory decisions setting prices and volumes for purchased gas and transportation rights provided by contract to deliver the gas.

Defendants' motion to dismiss the pipeline access claims on the ground that they are barred by the filed rate doctrine is GRANTED.

Appendix B

E. *State Action Bars Plaintiffs' Pipeline Access Claims*

The law pertaining to the state action defense can be summarized as follows: Federal antitrust laws are subject to supercession by state regulatory programs. *Parker v. Brown*, 317 U.S. 341, 530-51 (1943) ("[N]othing in the language of the Sherman Act or its history . . . suggests its purpose was to restrain a state or its officer and agents from activities directed by its legislature."). The rule is grounded in principles of federalism and state sovereignty. *Federal Trade Commission v. Ticor Title Insurance*, 505 U.S. __, 112 S.Ct. 2169, 2176 (1992). Nevertheless, federalism does not justify a broad interpretation of state sovereignty. 112 S.Ct. at 2178. State action immunity is narrowly construed. *Id.*

Private entities may claim state action immunity. *Patrick v. Burget*, 486 U.S. 94 (1988). When applying the state action doctrine, courts and commentators have not distinguished between antitrust actions based on the Sherman Act and those based on other antitrust statutes. *Yeager's Fuel v. Pennsylvania Power & Light*, 22 F.3d 1260, 1265 n.7 (3rd Cir. 1994). State action immunity is an affirmative defense. *Id.* at 1266 (*citing FTC v. Ticor Title Ins. Co.*, __ U.S. __, 112 S.Ct. 2169, 2172 (1992).

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum. Inc.*, 445 U.S. 97, 105 (1980) (hereinafter *Midcal*) the Supreme Court set forth the test for determining whether a state anticompetitive mechanism operates because of a deliberate and intended state policy, such that the federal antitrust laws are superseded. First, "the challenged restraint must be clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105. Second, "the policy must be actively supervised by the State itself." *Id.*

Appendix B

1. *The CPUC's Authority To Regulate Is "Clearly Articulated"*

The first prong of *Midcal* requires a showing that "the challenged restraint [is] clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105. The principal point of contention between the parties is whether the CPUC's authority to regulate gas transmission is "clearly articulated" by California's legislature. According to Defendants, state law authorizes the CPUC to regulate all aspects of gas utility service, including transportation. Plaintiffs assert "the legislation cited by Defendants is neutral as to the challenged anticompetitive actions" and therefore the restraint is not "clearly articulated." (Plaintiffs' Opp. at 35:3-4). Plaintiffs further argue that because Defendants' conduct is contrary to the stated CPUC policy of promoting competition there is no clearly articulated policy regulating Defendants' acts. However, the CPUC was undeterred by the fact it asserted no direct jurisdiction over A&S and Canadian producers; it nonetheless actively regulated PG&E's gas prices and services including the A&S-producer contracts, "because such transactions . . . might adversely affect the interests of ratepayers." A-82-04-001, at 13-14 (1993); 43 C.P.U.C. 2d 275, 283 (1992); *Re App. of PG&E Co.*, D 94-03-050, at 29-30 (1994).

The first question is whether the California legislature has clearly articulated a regulatory policy regarding the alleged anticompetitive conduct of Defendants. However, Defendants need not demonstrate that the legislature authorized the specific conduct challenged if the law authorized the CPUC to regulate the Canadian contracts:

"A private party acting pursuant to an anticompetitive

> regulatory program need not point to specific, detailed legislative authorization for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."

Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 63 (1985). *Southern Motor Carriers* holds that statutory language authorizing the regulatory agency to proscribe "just and reasonable"[12] rates satisfy this requirement. *Id.* at 63-64; *see also* Cal. Pub. Util. Code §§ 728, 729 (West 1975); *Metro Mobile CTS, Inc v. Newvector Communications, Inc.*, 661 F. Supp. 1504, 1516 (D. Ariz. 1987); (holding a "constitutional and statutory mandate that [a state agency] prescribe just and reasonable rates is enough in and of itself to satisfy the first prong of *Midcal*") *Id.* at 1516; *aff'd*, 892 F.2d 62 (9th Cir. 1989); *Davis v. Southern Bell Tel. & Tel. Co.*, 755 F. Supp. 1532, 1538 (S.D. Fla. 1991).

The CPUC has broad statutory authority to regulate public utilities. *Consumer Lobby Against Monopolies v. Public Utils. Comm'n*, 25 Cal.3d 891, 905 (1979). It is statutorily authorized to determine whether a public utility's methods of "distribution" and "transmission" are "unjust" or "unreasonable"; and to "determine how [interstate pipeline] capacity held by the utilities is allocated to customers and other shippers." Cal. Pub. Util. Code § 761 (Went 1975); *see also Re Natural Gas Procurement*

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12. The statute enumerated various factors that the regulatory agency was to consider in arriving at "just and reasonable" rates. The Court noted that these factors "[bore] no discernable relationship to the prices that would be set by a perfectly efficient and unregulated market." *Southern Motor Carriers*, 471 U.S. at 65 n.25.

and Reliability Issues, 41 C.P.U.C. 2d 668, 691-92 (1991) ("Transportation of natural gas is a service and a method of transmission under Section 761."). The CPUC also must "establish priorities among the types or categories of customers of . . . every gas corporation." Cal. Pub. Util. Code § 2771 (West 1994). "The commission shall determine which of such customers and uses provide *the most important public benefits and serve the greatest public need* and shall categorize all other customers in order of descending priority based upon these standards." *Id.* (emphasis added). Section 2774 provides that:

> "In the event and . . . gas corporation experiences any shortage of capacity or capability in the generation, production, or *transmission* of . . . gas . . . the commission shall, to the extent practicable, order that service be temporarily reduced by an amount that reflects the priorities established pursuant to this chapter. . . ."

Cal. Pub. Util. Code § 2774 (West 1994) (emphasis added).

These statutes demonstrate the California Legislature's intent to displace, at least partially, free market competition with regulation. Defendants maintain that the alleged unlawfulness of their conduct is irrelevant for purposes of state action. In analyzing the clear articulation requirement, it is not determinative that defendants' conduct may be anticompetitive. *New England Motor Rate Bureau Inc. v. FTC*, 908 F.2d 1064, 1074 (1st Cir. 1990).

As in *Southern Motor Carriers*, the legislature has empowered the CPUC to regulate PG&E's gas transmission to ensure that it is just and reasonable. The statutory mandate that

the CPUC prioritize the needs of gas customers according to "public benefits" and apportion gas transmission capability according to these priorities is a clear articulation of California's intent "to displace price competition . . . with a regulatory structure." *Southern Motor Carriers*, 471 U.S. at 65. Plaintiffs' argument to the contrary ignores plain statutory language and the CPUC's own interpretations regarding its authority to regulate transportation capacity. *Re Natural Gas Procurement and Reliability Issues*, 41 C.P.U.C. 2d 668, 677, 691-92 (1991) ("[P]ursuant to Section 761, the commission has the authority to require PG&E to change the way it offers transportation service and to require PG&E to assign firm capacity rights to noncore customers."). Here, plaintiffs assert Defendants are not entitled to state action immunity as their conduct violated California's "policy of competition and open access to the natural gas market." (Plaintiffs' Opp. at 36:10); 30 C.P.U.C. 2d 576, 585 (1988). This position is unsupported by Ninth Circuit precedent:

> "[Plaintiff]'s contention that PG&E performed these acts in bad faith, and therefore in contravention of state policy, is to no avail. In *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985), we rejected a claim that the bad faith behind the anticompetitive conduct of certain government officials destroyed their immunity under the state action doctrine."

Nugget Hydroelectric v. Pacific Gas & Elec. Co., 981 F.2d 429, 434 (9th Cir. 1992). So long as the *Midcal* requirements are met, state action immunity attaches to Defendants' conduct even if it is allegedly inconsistent with the state's regulatory policies. The appropriate forum for Plaintiffs' claim that Defendants violated the California's regulatory policies is before the CPUC,

not federal court. *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985). Plaintiffs, for reasons best known to them, chose not to participate in any of the CPUC proceedings directed to the conduct they complain of here.

2. *The CPUC Actively Supervised The Allocation Of Pineline Access*

The purpose of the active supervision requirement is:

> "to determine whether the State was exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy."

FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2177 (1992). Plaintiffs argue that although the CPUC exercised some supervision over PG&E's conduct, it did not, and could not, supervise the private anticompetitive agreements between A&S and Canadian gas producers. According to Plaintiffs, once these agreements were executed, the CPUC was unable to prevent Defendants from "stuffing" the pipeline and could only "regulate around" the antitrust violations.

In general, the CPUC cannot order a utility to alter or breach its contracts. *California Water & Tel. Co. v. Public Util. Comm'n*, 51 Cal. 2d 478, 488 (1959); *Application of PG&E Co.*, 76 C.P.U.C. 134, 139 (1973). However, the CPUC asserts its power to modify contracts when necessary to protect the public interest.

Re Rate Design for Unbundled Gas Utility Services, 22 C.P.U.C. 2d 444, 484 (1986) ("[W]e are duty bound to protect the public welfare and accordingly can give no ironclad guarantee that contractual provisions will be immune from modification in circumstances in which those provisions unequivocally thwart public interest."). The CPUC held that "all PG&E's gas supply contracts, including those with PGT and A&S, should be subject to reasonableness review. . . ." 37 C.P.U.C. 2d 583, 617 (1990). For example, the CPUC decided in 1990 that the A&S contracts needed to be renegotiated in order to increase pipeline capacity for non-core users. *Re Refinements to the Regulatory Framework for Gas Utilities*, 37 C.P.U.C. 2d 87, 104-05 (1990) ("[W]e expect the A&S contracts to be renegotiated.").

Plaintiffs allege that PG&E denied pipeline access to non-core users by implementing its core election program. According to Plaintiffs, PG&E filled PGT's pipeline capacity by encouraging non-core customers, including UEG, the largest noncore customer, to elect core service. However, the core election program, and UEG's core election in particular, were continuously reviewed by the CPUC. In 1988, the CPUC recognized and approved core elections that resulted in less pipeline access for non-core customers, but found that it "was prudent for PG&E to maximize core election as a means to secure the benefits of competition for captive core customers" and also acknowledged that even if non-core customers benefited from cheaper spot market gas, prices for core and other customers would be higher. *Re Natural Gas Procurement and System Reliability*, 30 C.P.U.C. 2d 545, 558-60 (1988). Subsequently, the CPUC began to reduce the amount of gas that it permitted PG&E to transport on PGT's pipeline so that more capacity would be available for non-core customers. *See* 37 C.P.U.C.2d at 618-20 (reducing percentage of UEG's core

election); 41 C.P.U.C. 2d at 694 (same). In doing this, the CPUC ruled it could reduce such volume of gas without regard to A&S or PGT contractual commitments, because PG&E ratepayers had not guaranteed those contracts. 37 C.P.U.C. 2d at 617. In 1991, the CPUC ordered PG&E to make 250 MMcf per day of PGT pipeline capacity available to non-core customers. 37 C.P.U.C. 2d at 594, 609. This was increased to 466 MMcf per day, approximately 43% of PGT's capacity, in 1993. 41 C.P.U.C. 2d at 681, 706.

The regulatory record belies Plaintiffs' assertion that the CPUC did not actively supervise, review, and expressly authorize Defendants' conduct by permitting PG&E's core election program, with knowledge of its effect on pipeline capacity. The CPUC played a substantial role in the development of PG&E's gas import programs. The CPUC's decisions were not dictated by the terms of A&S's natural gas contracts, but rather the CPUC actively regulated PG&E's gas rates and volumes in derogation of the terms or objectives of the foreign contracts. *Sandy River Nursing Care v. Aetna Car. & Sur.*, 985 F.2d 1138, 1147 (1st Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 70 (1993). The federal antitrust denial of access claims against PG&E are barred by the state action defense and must be dismissed.

Defendants contend that PGT and A&S may also assert the state action defense. They rely on the decisions of the CPUC which reviewed and round reasonable the agreements between PG&E, PGT and A&S, including volumes of gas purchased, transported, effect on pipeline capacity, allocation of take-or-pay liabilities, and PG&E's guarantee of A&S's financing for the take or pay liabilities. 27 C.P.U.C. Reasonableness Dec. at 39-46; 37 C.P.U.C. 2d 87, 104-105 (1990); 41 C.P.U.C. 2d at 668, 688-90 (1991); *Re Pacific Gas and Elec. Co.*, D93267, at 5

(1981) and D85752 (1976). As the agreements and conduct of PGT and A&S relative to Plaintiffs' anticompetitive claims were the subject of active state regulation by the CPUC under the same clearly articulated and affirmatively expressed state policy as to PG&E's gas prices and transportation agreements, and because all Plaintiffs are alleged PG&E customers, state action immunity also bars the claims against PGT and A&S, despite the fact these firms were indirectly regulated. Put another way, the CPUC's rate setting and pipeline access orders are intervening legal causes of Plaintiff's alleged injuries. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *cf. Kaiser Cement Corp. v. Fischbach and Moore, Inc.*, 793 F.2d 1100, 1104-05 (9th Cir. 1986) *cert. denied*, 479 U.S. 949 (1986).

Finally, PG&E's objection to the CPUC's jurisdiction to have regulated the PGT and A&S contracts "is not an appropriate basis for disregarding state action immunity," even if state regulation is erroneous. *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1334 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989); *see also City of Columbia v. Oman Outdoor Advertising, Inc.*, 499 U.S. 365, 371-72 (1991) (federal courts would become state administrative appeals tribunals).

F. *Substantive Validity Of Plaintiffs' Claims For Denial Of Pipeline Access*

1. *Core Customers Cannot Assert Denial of Access Claims*

Defendants move to dismiss the denial of access claims brought on behalf of core customers such as Mary Grogan. They contend core customers fail to state an antitrust claim for denial of pipeline access because they are customers, not competitors, of Defendants.

Appendix B

Defendants construe Plaintiffs' denial of access claim as invoking the essential facility doctrine, which prohibits those with monopoly power over an "essential facility" from denying others access to the facility, absent a legitimate business reason. *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1379 (9th Cir. 1992). The elements of a claim for denial of an essential facility are: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Id.* at 1380. Plaintiffs acknowledge that core customers are not competitors of PG&E[13] and therefore cannot allege an essential facility claim.

However, Plaintiffs deny that their access claims are premised upon the "essential facility" doctrine. They contend the essential facility doctrine only applies to Sherman Act monopoly Section 2 claims. Plaintiffs allege the doctrine does not apply to Sherman Act Section 1 claims for conspiracy to restrain trade. However, Plaintiffs' analysis ignores the caselaw which applies the essential facility doctrine to Section 1 claims, to Section 2 claims, and also to cases in which only a single entity controls the essential facility. *See, e.g., United States v. Terminal R.R. Ass'n.*, 224 U.S. 383, 394 (1912); *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 369 (10th Cir. 1988). Moreover, the doctrine has been applied in a case where a utility denied competitors' access to its gas pipeline. *See Illinois ex rel. Burris v. Panhandle Eastern Co.*, 935 F.2d 1469, 1482-83 (7th Cir. 1991); *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp.

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13. By definition, core customers are incapable of competing with PG&E to purchase gas. Plaintiffs allege in the complaint that core customers "had no choice but to purchase their gas from PG&E." (AC, ¶ 16).

1437, 1461 (D. Kan. 1990). Ultimately, the core customers cannot allege an antitrust injury from denial of access to the pipeline. They do not compete for access to pipelines. The only injury they can allege, as consumers, is that they were overcharged for gas. Their remedy for rate improprieties is before the CPUC, not the federal court. *Keogh, supra*; (Mem. Op. at 36-38). The denial of access claims brought on behalf of core customers are dismissed for failure to state a claim, without leave to amend.

2. *The County Lacks Standing To Pursue Its Claim For Denial Of Access*

Defendants also move to dismiss the denial of access claims brought on behalf of non-core customers by the County. Defendants maintain that the County's failure to request or to be denied access to the PGT pipeline is fatal to an essential facility claim, or any other antitrust claim asserting denial of pipeline access. The County argues that prior demand for access is not a prerequisite to its claim. It contends that it has properly alleged standing and causation.[14]

Plaintiffs' claim for denial of pipeline access is premised upon the essential facility doctrine.[15] To state a claim for denial

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14. Plaintiffs argue the County is a less direct victim of the alleged anticompetitive conduct complained of and that other directly injured claimants exist. *Lucar v. Bechtel Corp.*, 800 F.2d 839, 844-45 (9th Cir. 1986). It is unnecessary to decide the standing issue on this theory. Moreover, if the County's claim is made as a customer, the claim is barred by the filed rate and state action doctrines.

15. Plaintiffs' argument that the denial of access claims do not depend upon the essential facility doctrine were previously discussed (Cont'd)

of access to an essential facility, the plaintiff must allege that it requested the access sought.[16] For example, the Ninth Circuit affirmed summary judgment against a plaintiff claiming denial of "relative size share access" to power transmission facilities in part because plaintiff "admit[ted] that it never requested relative size share access to [defendant's] transmission facilities." *City of Vernon v. Southern Cal. Edison*, 955 F.2d 1361, 1367 (9th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 305 (1992); *see also Cleary v. Nat'l Distillers & Chem. Corp.*, 505 F.2d 695, 697 (9th Cir. 1974) ("A plaintiff can have no relief when his failure to obtain a desired product is attributable to his own failure to make a request.")

Plaintiff does not allege that it is excused from requesting access on futility grounds. During the relevant period, the County could have attempted to obtain access to the PGT pipeline in several different ways. Under § 7(c) of the NGA, it could have

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(Cont'd)
and rejected. Even if the denial of access claim is not characterized as a claim for denial of an essential facility, in general, one who claims to have been denied entrance to the market must have taken " 'substantial and demonstrable steps to enter an industry and . . . [been] thwarted in that purpose by antitrust violations.' " *In re Dual-Deck Video Cassette Recorder Litig.*, 11 F.3d 1460, 1464 (9th Cir. 1993) (quoting *Solinger v. A&M Records Inc.*, 586 F.2d 1304, 1309 (9th Cir. 1975), *cert. denied*, 441 U.S. 908 (1979)). Here, the County did not take "substantial and demonstrable" steps to enter the market for Canadian natural gas imports because it did not attempt to gain access to PGT's pipeline. This failure bars it from pursuing its claim that it was denied entrance to the market by Defendants' alleged antitrust violations.

16. Even under general antitrust principles, a would-be competitor must allege substantial demonstrable steps to enter the industry. *Solinger*, 586 F.2d at 1309.

sought a certificate of public convenience and necessity to transport natural gas. Several shippers gained access to PGT's pipeline in this way. *Re Pacific Gas Trans. Co.*, 40 F.E.R.C. at 61,622 n.29 (1987). Alternatively, it could have sought a so-called "blanket certificate" under the FERC program adopted in October of 1985. PGT anticipated that there would be great interest in this new program, and, with approval of the FERC conducted a 1987 lottery for the purpose of allocating its available transportation capacity.[17] *Id.* at 61, 616-19, The County does not allege that it participated in the lottery. The County also could have participated in the CPUC's Customer-Identified-Gas Program, by which the CPUC required PG&E to use approximately 25% of PGT's pipeline capacity to transport gas on behalf of non-core customers. Moreover, in 1991, PGT offered the Section 311 shipper queue lottery for interruptible transportation rights. Had the County sought access to PGT's pipeline by one of these methods it might have obtained transportation rights, as other, similarly situated non-core customers did; even though the lack of capacity of the PGT pipeline, cuts against the element of the doctrine that it was feasible to provide the facility. The County's failure to seek access and the absence of denial of access caused by PGT bars its denial of access claims.[18] Plaintiffs' arguments that there was no pipeline capacity and that their access, if sought, would have been denied are minimalized by the undisputed fact that Plaintiffs never sought access to the PGT pipeline and do not allege futility as an excuse in the complaint.

---

17. PGT received bids totaling far in excess of its available pipeline capacity.

18. 40 F.E.R.C. at 61,625 n.9, demonstrates causation in fact is lacking for the independent reason that the PGT pipeline lacked the capacity to accommodate the County.

Appendix B

G. *Pleading Conspiracy To Deny Access.*

Defendants argue that even accepting Plaintiffs' allegations that Defendants conspired with the cartel to fix prices, no facts are pled that show any agreement between those parties to foreclose access to PGT pipeline capacity. (AC, ¶¶ 65-67, 115-16, 122, 128-29). Plaintiffs respond that the necessary allegations appear at ¶¶ 46, 48. The conduct alleged is unilateral action by PG&E and its subsidiaries, without the involvement of the cartel, whose members had no interest in gas transportation; *The Janery, Inc. v. James Jens, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988), with the exception that plaintiffs claim that PG&E and the cartel sought to "[reduce and eliminate] PG&E's existing and future TOP liabilities." (AC ¶ 46). The other consequence of the alleged conspiracy is that "PG&E made certain that pipeline open access would not be a problem for the cartel." (AC ¶ 48). An antitrust conspiracy may not be inferred without facts which support the existence of collusive, as opposed to independent conduct. *Berry v. Blue Cross*, 805 F.2d 866, 870 (9th Cir. 1986). A parent (PG&E) and its wholly owned subsidiaries are not legally capable of conspiring under the antitrust laws because they constitute a single enterprise for purposes of Section 1 of the Sherman Act. *The Volbroth Co. v. Sanui Corp.*, 9 F.3d 1455, 1463 (9th Cir. 1993) *cert. denied*, __ U.S. __, 114 S.Ct. 163 (1994). The motion to dismiss is GRANTED as to the conspiracy to deny access claims (the first, sixth, seventh, and eighth).

H. *The Claim For Injunctive Relief Is Moot.*

Plaintiffs' tenth claim seeks to enjoin Defendants from "engaging in, carrying out, or renewing any contracts, agreements, trusts or practices having the purpose or effect of continuing or renewing the aforesaid violations of federal and

state law or any contract, agreement, trust or practice having like or similar purpose or effect." Defendants move to dismiss this claim for mootness, asserting that it is premised upon past conduct, which is not reasonably likely to recur. Plaintiffs counter that injunctive relief is needed to remedy the lingering effects of Defendants' antitrust conspiracy.

"Article III of the United States Constitution confers jurisdiction on federal courts over 'cases' and 'controversies' and has been construed to prevent advisory opinions" and to assure that the requisite personal interest continue throughout the existence of the litigation. *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). A case is moot if "the issues are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Northwest Envtl. Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). Defendants bear the heavy burden of demonstrating mootness. *County of Los Angles v. Davis*, 440 U.S. 625, 631 (1979).

"As a general rule, '[p]ast wrongs are not enough for the grant of an injunction;' an injunction will issue only if the wrongs are ongoing or likely to recur." *FTC v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985). For example, where defendant ceases the allegedly wrongful conduct while the case is pending, injunctive relief is still available if there are continuing effects from the violation that can be remedied. *Northwest Envtl.*, 849 F.2d at 1244-45 ("[If] the court can still act to remedy such harm by limiting its future adverse effects, the parties clearly retain a legally cognizable interest in the outcome.").

Appendix B

All of the conspiratorial acts Plaintiffs complained of have ceased. One month before the original complaint was filed in this case, Defendants terminated the allegedly anticompetitive contracts. Plaintiffs aver no continuing harm from these past acts, *i.e.* the price-fixing scheme is not alleged to have affected current gas prices, nor do Plaintiffs contend that prior limitations on pipeline access are presently causing harm.

Since no continuing harm from the prior anticompetitive acts exists, there is no basis for an injunction, absent "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Plaintiffs suggest there is a need for injunctive relief because Defendants have entered into "other unknown, unseen gas supply contracts." This conclusory statement, unsupported by facts showing a "cognizable danger" of current or future antitrust violations, is insufficient to support the injunction claim. Nor will termination of the injunction claim bar plaintiffs from bringing a future suit if specific new and different wrongful conduct is identified. Plaintiffs' tenth claim for injunctive relief is DISMISSED with prejudice.

I. *The Denial Of Access Claims Are Barred By The Statute Of Limitations*

The statute of limitations for recovery of damages under a federal antitrust claim is four years. 15 U.S.C. § 15b. The same limitations period applies to California Cartwright Act claims and claims under the Unfair Business Practices Act. Cal. Bus. & Prof. Code § 16750.1 (Cartwright Act) (West 1987); *id.* § 17208 (Unfair Business Practices Act) (West 1987). Plaintiffs can only recover damages for overt acts in furtherance of the

alleged conspiracy within the limitations period, here measured from December 3, 1989. *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987); *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir. 1979). Where a continuing antitrust conspiracy is alleged, "an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Pace Indus. Inc.*, 813 F.2d at 237. There appears to be no dispute that alleged price-fixing activities prior to December 3, 1989, are barred. Defendants do not argue the bar of limitations against alleged price-fixing after December 3, 1989.

With respect to the denial of access claims, the following overt acts are alleged: (1) renegotiating the A&S gas contracts in 1984; (2) encouraging non-core customers to elect core service; and (3) causing UEG to elect core service (May 1988). The resulting harm, elimination of non-core customers' access was alleged to occur immediately after May 1, 1988. (AC ¶ 66). Plaintiffs do not allege the contracts were wrongfully modified as to volume after December 3, 1989. In this case, all of the overt acts pertaining to Plaintiffs' denial of access claims occurred prior to December 3, 1989, more than four years before the filing of the complaint.

Plaintiffs contend that the statute of limitations runs from PG&E's last purchase of gas under the 1984 contracts, in 1993, and the conspiracy is a continuing one. In *In re Lower Lake Erie Iron Ore Antitrust Litigation, supra*, 998 F.2d at 1172-73; *Hanover Shoe. Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968). However, performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period. *Aurora Enter. v. NBC*, 688 F.2d 689, 694 (9th Cir. 1982) ("[T]hat defendants receive a benefit

today as a result of a contract executed in 1966 . . . is not enough to restart the statute of limitations."); *Eichman v. Fotomat Corp.* 880 F.2d 149, 160 (9th Cir. 1989). That Defendants renegotiated the price of gas or continued to receive gas under their contracts does not restart the limitations period for the denial of access claims. Nor does *Hanover Shoe, supra,* 377 F.2d at 794-95 dictate otherwise. There, the time barred conduct was not the same and any recovery was limited to the limitations period.

J. *Wilson Tariff Act Claims.*

It has been determined that the Sherman Act claims cannot survive these motions. The same defenses bar the Wilson Tariff Act claims as a matter of law. See *Western Concrete Structure Co. v. Mitsui & Co.*, 760 F.2d 1013, 1019 (9th Cir.), *cert. denied,* 474 U.S. 903 (1985).

K. *The Clayton Act Claims.*

Liability for illegal exclusive dealing is not assessable against buyers. (Mem. Op. at 67-68); *McGuire v. C.B.S., Inc.*, 399 F.2d 902, 906 (9th Cir. 1968). Any sales by PG&E are not the ones complained of by plaintiffs.

Section 3 of the Clayton Act prohibits:

> "Any person engaged in commence, . . . [from making] a sale or contract for sale of goods . . . or other commodities, . . . on the condition, agreement or understanding that the . . . purchaser . . . shall not use or deal in . . . other commodities of a competitor . . . of the seller. . . ."

15 U.S.C. § 14.

Appendix B

Plaintiffs' price-fixing claims are based on A&S agreements to purchase natural gas from "the cartel" at inflated prices. Plaintiffs contend that PGT and PG&E are downstream buyers. (AC ¶¶ 34, 39-42, 53, 55). But, plaintiffs do not allege A&S sales to PGT, or that PGT's sales to PG&E are unlawful "exclusive dealing" agreements. Nor are Defendants, as parent and subsidiary corporations, legally capable of conspiring, *Copperworld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, (1984), or legally capable of entering into an exclusive dealing arrangement, *Advanced Health Care Service. Inc. v. Radford Comm. Hosp.*, 910 F.2d 139, 152 (4th Cir. 1990).

No sufficient denial of access exclusive dealing arrangement is alleged. Rather, the Clayton Act claim only identifies gas sales. (AC, ¶ 32). A service contract or sale of intangibles is not prohibited by Section 3 of the Clayton Act. *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368, 1372 (9th Cir. 1983). Transportation services are not goods or commodities under Section 3. *Cf. Fleetway, Inc. v. Pub. Serv. Interstate Transp. Co.*, 72 F.2d 761, 763 (3d Cir. 1934), *cert. denied*, 293 U.S. 626 (1935). The Section 3 Clayton Act claims for gas and transportation rights alleging anticompetitive exclusive dealing arrangements must be dismissed with prejudice.

L. *Cartwright Act Claims.*

Defendants argue Plaintiffs' denial of access claim under state anticompetition law is exempt from liability under the implied repeal doctrine due to the CPUC regulation of gas pipeline access. *Phonetel, Inc. v. AT&T*, 664 F.2d 716, 731-32 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983).

Plaintiffs respond the CPUC has no authority to regulate

PGT or A&S. However, it is regulation of the challenged conduct that determines availability of the defense. *Id.* The pervasiveness of such state regulation has been previously analyzed. "Plain repugnancy" exists between the state antitrust laws and CPUC policy to regulate transportation rights access, even if the regulatory environment for natural gas is moving to deregulation and open competition. Cases cited by plaintiffs to support a finding of no repugnancy are factually distinguishable. (*See* Def. Reply Mem. at 45 n.78).

A separate legal defense is raised under Cal. Pub. Util. Code § 1759, which grants exclusive jurisdiction to the California Supreme Court to review and affect the orders and actions of the CPUC. Plaintiffs' Cartwright Act claims for denial of access seek redress for Defendants' pipeline access activities which were reviewed and directed by the CPUC to protect core ratepayers. The Court cannot permit "an award of damages [which] would [ ] hinder or frustrate the Commission's declared supervisory and regulatory policies." *Waters v. Pacific Tel. Co.*, 13 Cal.3d 1, 4 (1974).

Defendants further argue that Cal. Pub. Util. Code § 2775 bars the denial of access claims because the CPUC allocated PG&E's rights to PGT pipeline capacity. Plaintiffs respond that denial of pipeline access resulted from requirements of the Canadian contracts not CPUC rulings. The CPUC issued orders concerning capacity brokering among core and non-core customers; rejected objections that reallocation would interfere with A&S producer contracts; and expressly overrode A&S-producer contracts. 43 C.P.U.C. 2d at 286; D.94-03-050 at 29-30. If the plaintiffs were denied PGT pipeline access, it was as a result of CPUC orders, which bars these claims under Cal. Pub. Util. Code § 2775.

Appendix B

The Cartwright Act claims must be dismissed as to all defendants without leave to amend.

CONCLUSION

For the reasons analyzed above, Plaintiffs' first amended complaint and each and every claim thereof is dismissed with prejudice. Defendants' counsel shall prepare a judgment in conformity with this opinion and lodge it with the court within five (5) days following the date of service of this opinion by _____ the clerk of the court. SO ORDERED.

DATED: December 15, 1995.

s/ Oliver W. Wanger
Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

PG&E.DSC

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED JANUARY 16, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5866 OWW

COUNTY OF STANISLAUS, a public entity, and MARY GROGAN, an individual, on behalf of themselves, and all entities and persons similarly situated,

Plaintiffs,

vs.

PACIFIC GAS & ELECTRIC COMPANY a California corporation, PACIFIC GAS TRANSMISSION COMPANY, a wholly-owned subsidiary of Pacific Gas & Electric Company, and ALBERTA AND SOUTHERN GAS CO. LTD., a wholly-owned subsidiary of Pacific Gas & Electric Company and a foreign corporation,

Defendants.

JUDGMENT

The motion of defendants Pacific Gas & Electric Company, Pacific Gas Transmission Company, and Alberta & Southern Gas Company, Ltd. (collectively, "defendants") to dismiss plaintiffs' First Amended Complaint came on regularly for hearing before the Court, the Honorable Oliver W. Wanger, District Judge, presiding. The matter having been duly heard and considered and decision having been duly rendered in the Court's Memorandum Opinion and Order Re: Defendants' 12(b)(6) Motion to Dismiss,

Appendix C

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiffs take nothing from defendants, that the action be dismissed with prejudice, and that defendants recover their costs of suit.

Dated: January 5, 1996.

s/ Oliver W. Wanger
OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

Submitted by:

M. Laurence Popofsky (Bar No. 33946)
Stephen V. Bomse (Bar No. 40686)
Marie L. Fiala (Bar No. 79676)
HELLER, EHRMAN, WHITE & McAULIFFE
333 Bush Street
San Francisco, California 94101-2878
(415) 772-6000

Donald H. Glasrud (Bar No. 42491)
Timothy J. Buchanan (Bar No. 100409)
DIETRICH, GLASRUD & JONES
5250 North Palm Avenue, Suite 402
Fresno, California 93704
(209) 435-5250

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 15, 1997

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-15275

D.C. No. CV-93-05866 (OWW)
(District Eastern Calif.)

COUNTY OF STANISLAUS, a Public Entity; MARY GROGAN; RON DEMIRDJIAN,

Plaintiffs - Appellants,

v.

PACIFIC GAS AND ELECTRIC COMPANY, a California Corporation; PACIFIC ORDER GAS TRANSMISSION COMPANY, a wholly owned subsidiary of Pacific Gas & Electric Company,

Defendants - Appellees.

Before: BRUNETTI, FERNANDEZ and HAWKINS, Circuit Judges.

The panel as constituted above has voted to deny California's Application for Leave to File Brief of Amicus Curiae in Support of Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, to deny California's Request for Judicial Notice, and to deny Plaintiffs-Appellants' Request for Judicial Notice.

Appendix D

The panel has also voted to deny Plaintiffs-Appellants' Petition for Rehearing and to reject their Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc and no judge of the court has called for a vote to rehear this matter en bane. Fed. R. App. P. 35.

The Petition for Rehearing is denied and the Suggestion for Rehearing En Banc is rejected.

APPENDIX E — RELEVANT STATUTES

15 U.S.C.S. § 1. Trusts, etc., in restraint of trade illegal; penalty

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

* * *

15 U.S.C.S. § 8. Trusts in restraint of import trade illegal; penalty

> Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. . . .

* * *

Appendix E

15 U.S.C.S. § 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

* * *

15 U.S.C.S. § 717b. Exportation or importation of natural gas

(a) After six months from the date on which this Act takes effect no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to

do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas —

(1) the importation of such natural gas shall be treated as a "first sale" within the meaning of section 2(21) of the Natural Gas Policy Act of 1978 [15 USCS § 3301(21)]; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to

be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

* * *

16 U.S.C.S. § 824. Declaration of policy; application of Part

* * *

(b) Use or sale of electric energy in interstate commerce. (1) The provisions of this Part [16 USCS §§ 824 et seq.] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part [16 USCS §§ 824 et seq.] and the Part next following [16 USCS §§ 825 et seq.], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provision of sections 210, 211, and 212 [16 USCS §§ 824i, 824j, and 824k] shall apply to the

entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act [16 USCS §§ 791a et seq.] with respect to such provisions. Compliance with any order of the Commission under the provisions of section 210 or 211 [16 USCS §§ 824i or 824j], shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

* * *

15 U.S.C.S. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * *

(c) Schedules. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public

inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, classifications, and services.

* * *

15 U.S.C.S. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. . . .

Supreme Court, U. S.
FILED
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No. 97-804

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF STANISLAUS, A PUBLIC ENTITY;
AND MARY GROGAN, AN INDIVIDUAL;
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PACIFIC GAS & ELECTRIC COMPANY, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF STATES IN SUPPORT OF PETITIONERS

CHARLES D. GRAY
General Counsel
J. BRADFORD RAMSAY
Assistant General Counsel
NATIONAL ASSOCIATION OF
REGULATORY UTILITY
COMMISSIONERS
Suite 603
Old Post Office Pavilion
1100 Pennsylvania
Avenue, N.W.
Post Office Box 684
Washington, D.C. 20044-0684
(202) 898-2200

PETER ARTH, JR.
EDWARD W. O'NEILL
ELLEN S. LEVINE*
HARVEY Y. MORRIS
**Counsel of Record*
PEOPLE OF THE STATE
OF CALIFORNIA AND
THE PUBLIC UTILITIES
COMMISSION OF THE
STATE OF CALIFORNIA
505 Van Ness Avenue
San Francisco, CA 94102
(415) 703-2047

December 11, 1997

[Additional Counsel Listed on Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

MYRA L. KAREGIANES
General Counsel
JOHN P. KELLIHER
Solicitor
ILLINOIS COMMERCE COMMISSION
160 North LaSalle Street
Suite C-800
Chicago, IL 60601
(312) 793-2877

DIANE MUNNS
IOWA UTILITIES BOARD
Lucas State Office Building
Des Moines, IA 50319
(515) 281-4189

FRANK J. KELLEY
Attorney General
THOMAS L. CASEY
Solicitor General
DON L. KESKEY
HENRY J. BOYNTON
Assistant Attorneys General
STATE OF MICHIGAN AND MICHIGAN PUBLIC SERVICE COMMISSION
6545 Mercantile Way,
Suite 15
Lansing, MI 48911
(517) 334-7650

TIMOTHY J. MCCLELLAN
Assistant General Counsel
PENNY G. BAKER
Deputy General Counsel
MISSOURI PUBLIC SERVICE COMMISSION
P.O. Box 360
Jefferson City, MO 65102
(573) 751-4140

ANN P. WILKINSON
Assistant Legal Counsel
PUBLIC UTILITIES COMMISSION OF NEVADA
727 Fairview Drive
Carson City, NV 89701
(702) 687-6008

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in concluding that the filed rate doctrine absolutely bars antitrust review under the Sherman Act of the anticompetitive conduct of a monopoly utility that chooses to purchase from its affiliates a quantity of high-cost gas which a federal agency has merely authorized, but not required, to be imported for sale, when the federal agency has authorized lower-cost supplies to compete with the affiliates' supply.

2. Whether the Ninth Circuit erred in concluding that the *Nantahala/Pike County* exception to the filed rate doctrine was inapplicable to antitrust review under the Sherman Act, and presumably state prudence reviews under Section 1(b) of the Natural Gas Act, of a monopoly utility's purchase of a quantity of high-cost gas which a federal agency has merely authorized, but not required, to be imported, even though the federal agency has given the utility discretion to choose among all federally-authorized imported supplies.

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BRIEF *AMICUS CURIAE* OF STATES IN SUPPORT OF PETITIONERS[1]

Amici Curiae, state regulatory commissions and their national association, hereby submit their brief *amicus curiae* urging the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and to set the cause for briefing and oral argument. Pursuant to Rule 36.2 of this Court, *Amici* have obtained the written consent of all parties in this case and have filed letters of consent with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are States, as represented by their state regulatory commissions or their respective Attorneys General, and the National Association of Regulatory Utility Commissioners, a quasi-governmental nonprofit organization of state officials from the fifty states and the District of Columbia charged with regulating the distribution of natural gas and electricity within their respective jurisdictions. *Amici* have a vital interest in ensuring just and reasonable retail gas and electric rates to the captive and other customers of monopoly utilities operating within their states. The question in this case is particularly important because the Ninth Circuit's erroneous holding on the *Pike County/Nantahala* exception to the filed rate doctrine could seriously compromise the States' ability in setting retail rates to review whether the monopoly utility purchased prudently among all federally-authorized sources of gas or electricity.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF THE CASE

1. Introduction

In 1938, Congress enacted the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* " 'to protect consumers against exploitation at the hands of natural gas companies.' " *General Motors Corp. v. Tracy*, 519 U.S. ___, 117 S.Ct. 811, 821 (1997) ("*GMC v. Tracy*"), quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 520 (1947). Pursuant to Congress' reservation of state authority under Section 1(b), 15 U.S.C. § 717(b), all fifty States conduct prudence reviews of the purchasing practices of monopoly local distribution companies ("LDCs") to protect the States' vital interest in ensuring that the captive residential and commercial customers of the monopoly are charged just and reasonable retail rates for their gas and electric service. *GMC v. Tracy*, 117 S.Ct. at 821.

In an antitrust case in which neither the State of California nor the federal government was a party, the Ninth Circuit's decision below expressly "forecloses any challenge" to the anticompetitive conduct of a California LDC that chooses to purchase from its affiliates a quantity of gas or electricity which a federal agency has merely authorized, but not required, to be imported for sale. *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 864 (9th Cir. 1997). Pet. App. A 13a. No federal agency considers whether the LDC prudently purchased among all federally-authorized supplies, and to date, the discipline of a competitive marketplace does not extend to monopoly LDCs to ensure that they buy the lowest cost supply on behalf of their captive consumers.

As discussed below, the Ninth Circuit's ruling directly conflicts with a holding from the Third Circuit and with decisions from other federal and state appellate courts; directly contradicts orders of the very federal

agencies charged with implementing the NGA; and directly contravenes the NGA by henceforth enabling monopoly LDCs to escape any review of their anticompetitive conduct simply by purchasing from their affiliates gas from Canada which the federal government must automatically approve for import under Section 3 of the NGA, as amended, 15 U.S.C. § 717b(c). Under Federal Rule of Appellate Procedure ("FRAP") 29, the State of California sought to point out all of this in a proffered *amicus curiae* brief, but the Ninth Circuit refused to allow California to file its brief.[2] The Ninth Circuit also blinded itself to the views of the federal agencies affected by its erroneous ruling.[3]

2. Proceedings Below

Characterizing the issue as a matter of first impression, the Ninth Circuit asserted in the decision below that the filed rate doctrine "forecloses any challenge" to the lawfulness of a monopoly LDC's purchase for retail sale of a particular volume of gas that the Economic Regulatory Administration ("ERA") of the DOE authorized for import, among other volumes. Pet. App. A 13a. The Ninth

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[2] In direct violation of FRAP 29, the Ninth Circuit panel which issued the decision below not only refused to consider the serious legal errors that California identified, but also prevented the other active circuit judges of the Ninth Circuit from considering such errors in determining whether to grant rehearing *en banc*. California's absolute right to be heard under FRAP 29 was therefore abrogated. Pet. App. D 73a.

[3] The Ninth Circuit denied California's motion for judicial notice of numerous Department of Energy ("DOE") orders that demonstrated that DOE's import approvals were authorizations, not mandates, for the import of particular supplies of gas, and that DOE left to the customer the choice of which supply to purchase. Pet. App. D 73a.

Circuit held that such federal approval is "conclusively reasonable." *Id.*

The Ninth Circuit nevertheless recognized that in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1987) ("*Nantahala*"), a case involving a state prudence review, this Court "left open the possibility that a claim concerning the quantity of [gas] purchased might survive the filed rate doctrine," even though such gas was purchased at rates approved by the Federal Energy Regulatory Commission ("FERC"), if lower cost gas was available elsewhere. Pet. App. A 14a-15a and n.3. The Ninth Circuit, however, concluded that plaintiffs' claims did not "fall within this narrow question," known also as the *Pike County*[4] exception to the filed rate doctrine, because the question in *Nantahala* "concerned *rates* filed with *FERC*," while "this case concerns *volumes* filed with *ERA*." Pet. App. A 15a (emphasis in original). The Ninth Circuit deemed that such "difference is critical . . . because the volumes in the instant case had received ERA approval . . . [and] . . . are *conclusively reasonable*." *Id.* (emphasis in original). The Ninth Circuit also explained that "*Nantahala* concerned action by FERC only," whereas in this case, "along with FERC price approval, PG&E had filed the particular quantity of gas purchased with ERA." *Id.* Based on these perceived distinctions, the Ninth Circuit stated that "the *Nantahala* [or *Pike County*] exception is not applicable." *Id.*

The *Nantahala/Pike County* exception to the filed rate doctrine has long been invoked by States as critical to discharging their statutory responsibility of protecting captive customers from an LDC's unreasonable purchases in light of federally-authorized alternatives. The Ninth

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[4] *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983).

Circuit's erroneous holding on the *Nantahala/Pike County* exception could therefore seriously compromise the States' authority to ensure just and reasonable retail rates to the LDC's captive customers.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit is in conflict with the Third, Fourth, Fifth and Eighth Circuits, which have recognized that the *Nantahala/Pike County* exception to the filed rate doctrine permits a challenge to a local utility's purchase of a particular supply of gas or power unless a federal agency has mandated the purchase of such supply by the utility. Absent a federal mandate, these circuits have found that under the *Nantahala/Pike County* exception, a State may review whether a local utility purchased prudently in light of other available federally-authorized alternatives. The decisions of these circuits, as well as the decisions of state courts of last resort and decisions of the federal agencies charged with implementing the NGA that have considered this issue, are all in accord with *dicta* from this Court's opinions in *Nantahala* and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) ("*MP&L*"). In those cases, this Court suggested, without deciding, that a State could challenge the prudence of an LDC's purchase of an amount of power that was approved, but not ordered, by a federal agency in lieu of purchasing such amount from other federally-approved sources. *Nantahala*, 476 U.S. at 972; *MP&L*, 487 U.S. at 374. Congress likewise recognized in 1992 when it amended Section 3 of the NGA, 15 U.S.C. § 717b(c), that, although the federal government must automatically approve the import of gas from countries with a free trade agreement with the United States, such as Canada, States remained free to continue to review the prudence of an LDC's purchased gas costs in setting retail rates. 138 Cong. Rec.

H11404 (daily ed. Oct. 5, 1992) (bipartisan statement of Reps. Sharp, Markey, Moorhead & Lent).

The important issue which this Court left unresolved in *Nantahala* and *MP&L* must now be decided to reconcile the Ninth Circuit's decision with contrary judicial, congressional and federal administrative authorities. Absent action by this Court, nothing will prevent LDCs within the Ninth Circuit and other circuits from seeking to shield from review their anticompetitive and imprudent conduct in purchasing from their affiliates gas or power that a federal agency merely authorized, instead of purchasing similarly-authorized lower-cost supplies that are also available. Indeed, Pacific Gas and Electric Company ("PG&E"), an LDC in California, has already seized on the Ninth Circuit's language in challenging the right of the California Public Utilities Commission ("CPUC") to review the prudence of PG&E's purchase of a particular quantity of gas from one DOE-authorized source rather than from other available, lower cost sources that DOE had also authorized for import. PG&E has also readily admitted that "this issue [of whether the CPUC can lawfully conduct a prudence review of an LDC's discretionary purchases] will continue to arise and cause uncertainty and conflict . . . until it is resolved by a court."[5] This Court should grant certiorari to affirm the *Nantahala/Pike County* exception to the filed rate doctrine and announce a uniform rule governing its application.

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[5] PG&E Mem. of Pts. & Auths. In Reply to Defendant CPUC's Opp. to PG&E's Mot. for Summ. Judgmt at 3, *Pacific Gas & Electric Co. v. Pub. Utils. Comm'n*, Civ. No. 94-4381 (N.D. Cal. 1997). Although this federal case was subsequently dismissed, PG&E's warning that this issue will continue to arise should be heeded.

I. THE NINTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH A HOLDING FROM THE THIRD CIRCUIT, WITH UNEQUIVOCAL LANGUAGE IN DECISIONS OF THE FOURTH, FIFTH, AND EIGHTH CIRCUITS, WITH DECISIONS OF AT LEAST THREE STATE COURTS OF LAST RESORT, AND WITH DECISIONS OF THE FEDERAL AGENCIES CHARGED WITH IMPLEMENTING THE NATURAL GAS ACT

A. Conflict with the Decisions of Other Courts

In direct conflict with the holding of the Third Circuit in *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir.), *cert. den.*, 488 U.S. 941 (1988) ("*Kentucky West I*") and the position of the FERC in that case, the Ninth Circuit asserted that the mere approval of import volumes by a federal agency, standing alone, is sufficient to trigger the filed rate doctrine as an absolute bar to any challenge to the LDC's purchase of a particular quantity of gas from one of several federally-approved sources.

In *Kentucky West I*, the Third Circuit held that the filed rate doctrine did not bar a State from denying the LDC's recovery of the costs of gas purchased from a particular wholesaler at rates that FERC had merely approved, where the LDC had a choice to buy the same quantity of gas from another wholesaler at a lower rate. *Id.* at 609. The Third Circuit recognized that there is "no conflict between FERC's authority and that granted to the PUC" when the PUC reviews whether "the retailer acted with economic prudence in purchasing from one wholesaler rather than another." *Id.* Thus, "[a]lthough *Nantahala* underscores that a state cannot independently pass upon the reasonableness of a wholesale rate on file with FERC, it in no way undermines the long-standing notion that a state commission may legitimately inquire into whether

the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source." *Id.*

The FERC itself filed a brief in *Kentucky West I* in support of the State's right under Section 1(b) of the NGA, and consistent with federal precedent and practice, to review the prudence of an LDC's purchasing options among federally-approved wholesale supplies in setting retail rates. 837 F.2d at 605 n.4; 609.[6]

Two years later, the Third Circuit succinctly explained that the filed rate doctrine precluded a state prudence review of LDC-incurred wholesale costs only when the federal agency *mandates* the wholesale purchase. Contrasting its decision in *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 862 F.2d 69, 73-74 (3d Cir. 1988), with its earlier decision in *Kentucky West I*, the Court explained:

> In *Nantahala Power*, the Supreme Court concluded that under the filed-rate doctrine states may not bar regulated utilities from recovering FERC-mandated wholesale costs. The supremacy clause requires that utilities be permitted to pass through these costs to their retail customers in retail rates, *See Nantahala Power*, 476 U.S. at 967-972, 106 S.Ct. at 2356-60. This preemptive effect attaches not only to wholesale rates, but to other FERC decisions "affect[ing]" those rates. *See id.* at 967, 106 S.Ct. at 2357. If a utility could not pass through these FERC-approved costs, they would become "trapped."

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[6] *Amici* have lodged with this Court copies of the FERC's brief in *Kentucky West I*, which contains a comprehensive review in support of the State's authority under the *Nantahala/Pike County* exception to the filed rate doctrine to challenge the prudence of an LDC's discretionary purchase of high-cost gas approved for sale by the FERC, when lower cost supplies of gas, also approved for sale by the FERC, were available.

> This, the Court concluded, would violate the supremacy clause. These principles were recently reaffirmed by the Supreme Court in *Mississippi Power*. *See Mississippi Power*, 108 S.Ct. at 2439.
>
> In *Kentucky West I* we held that when a utility had the option of purchasing wholesale gas at a lower rate, *Nantahala Power* did not mandate pass-through of an actual cost incurred in the wholesale purchase of natural gas merely because the price at which the gas was purchased had FERC approval. *See Kentucky West I*, 837 F.2d at 609. However, the FERC-approved costs disallowed by the PUC here were *mandatory*, and the principles of *Nantahala Power* and *Mississippi Power* clearly apply to the case before us. *See, e.g., Mississippi Power*, 108 S.Ct. at 2440 (state review of prudence of purchase of power pre-empted where purchase was mandatory because FERC order covered both the cost and quantity of the power to be purchased) (footnote omitted) (emphasis in original).

At least three other circuits have similarly found that the essence of the *Nantahala/Pike County* exception to the filed rate doctrine is whether a retail utility had a *choice* to purchase other power or gas. *Appalachian Power Co. v. Public Service Comm'n*, 812 F.2d 898, 903 (4th Cir. 1987) ("*Pike County* inquiry is meaningless here because there is no alternative source of power for APC to choose . . . "); *Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444, 1450 n.4 (8th Cir. 1987) (*Pike County* not applicable because utility "has not chosen to buy energy from Grand Gulf I, in preference to some other source that might, in the end, appear more reasonable. It has been forced against its will by FERC to share the costs of the Grand Gulf I generating capacity."); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 911 F.2d 993, 1000 (5th

Cir. 1990), *cert. dism'd*, 502 U.S. 954 (1991) (courts have upheld denial of pass-throughs where a utility's purchase of a particular quantity of high cost power at FERC-approved rates was unreasonable if lower cost power was available from another source; "[h]owever, [the *Pike County*] line of cases had no application where FERC has not only determined the rate the utility *must* pay for the power, but also the amount of the power the utility *must* purchase," citing *Nantahala*, 476 U.S. at 972-973) (emphasis added).

Three state courts of last resort have also recognized that the *Nantahala/Pike County* exception to the filed rate is based on whether the utility had the option of buying wholesale power or gas from another source. *General Motors Corp. v. Illinois Commerce Comm'n*, 574 N.E.2d 650, 658 (Ill. 1991) (*Pike County* exception says that "States retain the authority to review the prudence of a distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge."); *In re Sinclair Machine Products, Inc*, 498 A.2d 696, 705 (N.H. 1985) (upholding right of state commission to inquire whether a retail electric utility prudently participated in a particular wholesale purchase agreement approved by FERC in light of available alternatives); *Pennsylvania Power Co. v. Pennsylvania Pub. Util. Comm'n*, 561 A.2d 43, 51 (Pa. Commw. Ct. 1989), *aff'd*, 587 A.2d 312 (Pa. 1990), *cert. den.*, 502 U.S. 821 (1991) (state review proper when "FERC did not mandate the particular purchase involved in this case, or otherwise limit Penn. Power's options for purchasing power").[7]

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[7] *See also Gulf States Utils. Co. v. Public Util. Comm'n*, 841 S.W.2d 459, 468-471 (Tex. Ct. App. 1992) (state's refusal to pass through unreasonable costs voluntarily incurred by utility is proper exercise of state's authority to review utility's

The Ninth Circuit's holding is irreconcilable with all of these decisions. By deeming conclusively reasonable under the filed rate doctrine an LDC's purchase of a particular supply of gas that a federal agency merely authorized, but did not mandate, for import and sale, the Ninth Circuit not only dismissed an antitrust complaint, but may also have abrogated the States' authority, reserved under Section 1(b) of the NGA, to ensure that the LDC, on behalf of its captive customers, bought the least expensive supply from among all federally-authorized imported or domestic supplies.

B. Conflict with Important Federal Interests

The Ninth Circuit's decision also flatly conflicts with and thwarts the interests of the federal government in promoting competition among all federally-approved imports or sales of gas or electricity into the same market; in providing customers with a greater choice among competitive supply sources when purchasing gas or electricity; and in reserving for state prudence review the purchasing decisions of monopoly LDCs which are not subject to the discipline of a competitive marketplace.

Prior to 1992, under Section 3 of the NGA, 15 U.S.C. § 717b, ERA routinely issued blanket import approvals, all of which were permissive so that the customer could choose which authorized import to buy. *Panhandle Producers & Royalty Owners Ass'n v. ERA*, 847 F.2d 1168, 1177

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purchasing strategy); *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d at 738 (state authority to determine whether reasonable for utility to pay particular price for federally-approved power in light of utility's alternatives does not overlap with the FERC's authority).

(5th Cir. 1988) ("ERA's policy is to grant blanket authorizations routinely" so that applicants "will face competition from others obtaining the ERA authorizations"); *Panhandle Producers & Royalty Owners Ass'n v. ERA*, 822 F.2d 1105, 1113 (D.C. Cir. 1987) ("no gas would be imported [by a customer] unless it were priced competitively"); *Bonus Energy, Inc.*, 1 E.R.A. ¶ 70,691 at p. 72,666 (1987) (even if gas approved for import, ERA expects customer will purchase gas only if needed and price-competitive). Thus, at the same time that ERA authorized Pacific Gas Transmission Company ("PGT") to import *up to* a specified volume of gas under a long-term import arrangement, ERA also authorized the import of lower cost volumes of Canadian gas into Northern California which PG&E alternatively could have purchased during the period at issue.[8] Indeed, to ensure customer choice among competitive, federally-authorized alternatives, ERA expressly rejected at least four times PGT's attempt to impose conditions to prevent the displacement of PGT's long-term Canadian gas with competitive, less expensive, short-term Canadian gas. *E.g., Northwest Alaskan Pipeline Co.*, 1 E.R.A. ¶ 70,585 at p. 72,367 (1985) ("If the customer finds a short-term purchase more attractive than an existing long-term arrangement, that represents a

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[8] *Pacific Gas Transmission Co.*, 1 E.R.A. ¶ 70,591 (1985); *Dome Petroleum Corp*, 1 E.R.A. ¶ 70,601 (1985) and 1 E.R.A. ¶ 70,735 (1987); *Salmon Resources, Ltd.*, 1 E.R.A. ¶ 70,612 (1985) and 1 E.R.A. ¶ 70,749 (1988); *Development Assocs., Inc.*, 1 E.R.A. ¶ 70,620 (1986) and 1 E.R.A. ¶ 70,765 (1988); *Poco Petroleum, Inc.*, 1 E.R.A. ¶ 70,621 (1986) and 1 E.R.A. ¶ 70,752 (1988); *Amoco Energy Trading Corp.*, 1 E.R.A. ¶ 70,624 (1986) and 1 E.R.A. ¶ 70,772 (1988); *Spot Market Corp.*, 1 E.R.A. ¶ 70,665 (1986) and 1 E.R.A. ¶ 70,712 (1987); *Kerr-McGee Chem. Corp.*, 1 E.R.A. ¶ 70,678 (1986) and 1 E.R.A. ¶ 70,840 (1989); and *Bonus Energy, Inc.*, 1 E.R.A. ¶ 70,691 (1987), *reh'g. den.*, 1 E.R.A. ¶ 70,702 (1987); *Windward Energy & Marketing Co.*, 1 E.R.A. ¶ 70,751 (1988).

signal that the long-term arrangement should be restructured . . . The ERA sees no need to impose conditions on this [short term gas] authorization to protect long-term arrangements from competition . . . "); *Dome Petroleum Corp.*, 1 E.R.A. ¶ 70,601 at p. 72,417 n.4 (1985).

In issuing its approvals, ERA neither dictated the source of the customer's purchase, nor determined that the customer's particular purchase was reasonable in lieu of competitive supply alternatives that ERA had also approved for import. *EnTrade Corp.*, 1 E.R.A. ¶ 70,774 at p. 72,882 (1988) (public interest finding "does not focus . . . on whether the gas can be supplied more economically by domestic or other suppliers in a particular instance").

In 1992, Congress amended Section 3 of the NGA to deem all gas imported from countries with a free trade agreement with the United States to be in the public interest. 15 U.S.C. § 717b(c). Thus, as of 1992, DOE approvals were automatic for gas imported from Canada and Mexico, both of which had signed a free trade agreement with the United States.

FERC in turn issued orders eliminating minimum take and most minimum bill provisions from wholesale contracts in order to give customers, including LDCs, "more freedom to make choices among potential supply sources."[9] Order 380-A, F.E.R.C. Stats. & Regs. 1982-1985, ¶ 30,584 at p. 31,061 (1984), *aff'd, Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. den.*, 476 U.S.

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[9] A minimum take provision required LDCs to physically take a specified amount of gas from the interstate pipeline. A minimum bill provision required LDCs to pay for a specified quantity of gas, even if not taken. Above that quantity, the LDC was free to purchase from any available source.

1114 (1986).[10] FERC made clear that it does "not tell [an LDC] that it must purchase or not purchase any particular gas supply." *Id.* In addition, FERC promoted alternative transportation options to enable a customer to arrange access to supplies other than those of interstate pipelines. *GMC v. Tracy*, 117 S.Ct. at 816-17.

At the same time, both DOE and FERC expressly recognized that when the customer buying the gas is a monopoly utility not subject to competitive market forces, it is for the State to determine whether the monopoly has prudently chosen from among its available supply options on behalf of its captive retail customers. *E.g., Northwest Alaskan Pipeline Co.*, 1 E.R.A. ¶ 70,580 at pp. 72,346-347 (1984) (approved import arrangement gave "greater flexibility to the State of California and to SoCal in determining which gas purchases are most equitable and economical to California consumers," and issue of which gas to take is "a matter outside the ERA's jurisdiction . . . The CPUC is in the best position to make decisions in the interest of the California consumer on this matter . . . "); *EnTrade Corp.*, 1 E.R.A. ¶ 70,774 at p. 72,885 (the "California Public Utility Commission appropriately regulates purchases of gas made by [LDCs] in that State. The ERA has not been convinced that it should intervene in the jurisdiction of another regulatory body."); *Brooklyn Union Gas Co.*, 1 F.E. ¶ 70,285 at p. 72,213 (1990) ("individual purchase decisions [by repurchasers (*i.e.*, LDCs) which import gas from their

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[10] In 1990, FERC completely eliminated the minimum bill obligation in PGT's wholesale agreement with PG&E, so that PG&E was free to purchase all, some, or none of its gas from PGT, subject to the California Public Utilities Commission's prudence review. *Pacific Gas Transmission Co.*, 50 F.E.R.C. ¶ 61,067 at p. 61,132 (1990).

affiliates] can be reviewed by state regulatory authorities"); Order 380-A, F.E.R.C. Stats. & Regs. 1982-1985 ¶ 30,584 at p. 31,061 ("In the case of PG&E's purchasing decisions, the CPUC will have to make [the] determination of [prudence]."); *Pacific Gas Transmission Co.*, 50 F.E.R.C. ¶ 61,067 at p. 61,128 ("CPUC to determine whether PG&E is making prudent choices" among its supply options); *Pacific Gas Transmission Co.*, 51 F.E.R.C. ¶ 61,086 at pp. 61,192-193 (1990) ("prudence of PG&E's purchasing practices is for the CPUC, and not this Commission, to decide"); *Doswell Ltd. Partnership*, 50 F.E.R.C. ¶ 61,251 at p. 61,758 n.18 (1990) (reaffirming that *Nantahala* does not preclude state prudence review of utility purchasing decisions); Order 500-H, F.E.R.C. Stats. & Regs. 1986-1990, ¶ 30,867 at p. 31,576 (1989), *aff'd in part and remanded in part, American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. den.*, 498 U.S. 1084 (1991) (LDC purchase practices would escape any prudence review if States unable to inquire whether LDC acted reasonably in light of alternatives); *Transwestern Pipeline Co.*, 43 F.E.R.C. ¶ 61,240 at p. 61,652 n.34 (1988) (under *Kentucky West I*, CPUC scrutinizes choices that SoCal makes as to its suppliers in setting retail rates); *Pennsylvania Power & Light Co.*, 23 F.E.R.C. ¶ 61,325 at p. 61,716 (1983) (FERC does not determine that purchaser's purchase is prudent; this is legitimate concern of the State).

By deeming DOE's import authorizations conclusively reasonable under the filed rate doctrine, and refusing even to consider the numerous DOE orders that directly contradict the Ninth Circuit's position, the Ninth Circuit's decision allows a monopoly LDC to thwart important federal interests by evading review under antitrust laws, and arguably under state regulatory laws, of its anticompetitive and imprudent conduct simply by buying imported gas from Canada or Mexico that the

DOE must automatically authorize. 15 U.S.C. § 717b(c). The Ninth Circuit's decision turns the NGA and the Sherman Act on their collective heads.

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The important question left unanswered in *Nantahala* and *MP&L* – whether a State may evaluate the prudence of a retailer's decision to buy a particular quantity of gas from one federally-approved source as opposed to another – must be settled to vindicate the State's vital interest under Section 1(b) of the NGA in protecting the captive ratepayers of a monopoly LDC, 15 U.S.C. § 717(b), and to resolve the conflict between the Ninth Circuit's decision and decisions of other federal circuits, state courts of last resort, and federal agencies that have applied or considered the *Nantahala/Pike County* exception.

In *Nantahala* and *MP&L*, this Court explained that the filed rate doctrine, as applied in federal preemption cases, is based on the principle that a State may not change or challenge whole rates, costs allocations or volumes mandated by a federal agency, or otherwise "trap" federally-mandated costs by denying their recovery in an LDC's retail rates. The rationale underlying the doctrine is that state action that precludes the recovery in retail rates of federally-mandated costs creates an impermissible conflict between federal and state directives. State action must therefore yield under the Supremacy Clause.

However, in *Nantahala*, this Court recognized, without deciding the issue, that "a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*." 476 U.S. at 972

(emphasis in original). Similarly, in *MP&L*, the Court stated "without purporting to determine the issue" that "it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power." *MP&L*, 487 U.S. at 374. In neither case did the Court need to resolve this issue because in both cases FERC had ordered a particular allocation of power, *"and no other."* *MP&L*, 487 U.S. at 373 (emphasis in original). The utility thus had no choice but to accept the FERC-ordered allocation.

Ignoring these principles, the Ninth Circuit stated below that "the question not answered in *Nantahala* concerned *rates* filed with *FERC*, whereas this case concerns *volumes* filed with *ERA*," and that such "difference is critical." Pet. App. A 15a (emphasis in original). However, this distinction is legally irrelevant. Conflict preemption under the filed rate doctrine arises only when a federal agency has *required* the utility to buy, or pay for, the particular supply of gas or power at issue, the costs of which the State then seeks to disallow in the utility's retail rates. In contrast, state action that bars recovery in retail rates of the costs of a particular supply that a federal agency has merely *authorized*, among other authorized supplies, for import and sale conflicts with no federal mandate nor otherwise subjects the utility to inconsistent state and federal agency orders.

Indeed, Congress was careful to preserve existing state authority to conduct prudence reviews of utility purchases when it amended Section 3 of the NGA in 1992 and deemed the importation of Canadian and certain other gas supplies to be in the public interest *per se*. 15 U.S.C. § 717b(c). Mindful of the NGA's purpose to close, not create, regulatory gaps, Congress made clear that:

> [A]utomatic approval, however, is not intended to modify the authority of the FERC or jurisdictional State commissions to review the prudence

> of the purchased gas when a jurisdictional utility seeks to include the cost of such natural gas in rates subject to the jurisdiction of the appropriate State or Federal agency. [¶] The public interest finding in this new section of the Natural Gas Act accordingly does not alter the authorities of the FERC or State commissions previously available with respect to the prudence of natural gas purchases.

138 Cong. Rec. H11404 (daily ed. Oct. 5, 1992) (bipartisan statement of Reps. Sharp, Markey, Moorhead & Lent).

The Ninth Circuit's decision below jeopardizes the very state authority to protect consumers that Congress so carefully sought to preserve. The decision also leads to untenable results. If ERA's discretionary public interest finding makes imported volumes of gas conclusively reasonable, then a congressionally mandated public interest finding under 15 U.S.C. § 717b(c) would similarly mean that imported volumes of gas, such as those from Canada, are conclusively reasonable. By this logic, an LDC could escape any review of its purchase of high-cost gas from the LDC's unregulated Canadian affiliate in lieu of purchasing lower-cost Canadian gas from other federally-approved sources. Neither ERA nor Congress intended such result.

CONCLUSION

The Ninth Circuit has allowed a monopoly utility to hide behind the filed rate doctrine to stave off any challenges to its anticompetitive conduct by buying gas or electricity that a federal agency merely authorizes, but does not mandate, for import and sale. By doing so, the Ninth Circuit has not only denied the utility's captive and other customers a right to redress the harm caused by the utility's unlawful conduct, but it has also placed at serious risk the vital interest of States to ensure just and

reasonable retail rates for these captive customers. *Amici* therefore respectfully urge that the petition for writ of certiorari be granted.

Respectfully submitted,

CHARLES D. GRAY
General Counsel
J. BRADFORD RAMSAY
Assistant General Counsel
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
Suite 603
Old Post Office Pavilion
1100 Pennsylvania Avenue, N.W.
Post Office Box 684
Washington, D.C. 20044-0684
(202) 898-2200

PETER ARTH, JR.
EDWARD W. O'NEILL
ELLEN S. LEVINE*
HARVEY Y. MORRIS
**Counsel of Record*
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
505 Van Ness Avenue
San Francisco, CA 94102
(415) 703-2047

MYRA L. KAREGIANES
General Counsel
JOHN P. KELLIHER
Solicitor
ILLINOIS COMMERCE COMMISSION
160 North LaSalle Street
Suite C-800
Chicago, IL 60601
(312) 793-2877

TIMOTHY J. MCCLELLAN
Assistant General Counsel
PENNY G. BAKER
Deputy General Counsel
MISSOURI PUBLIC SERVICE COMMISSION
P.O. Box 360
Jefferson City, MO 65102
(573) 751-4140

DIANE MUNNS
IOWA UTILITIES BOARD
Lucas State Office Building
Des Moines, IA 50319
(515) 281-4189

ANN P. WILKINSON
Assistant Legal Counsel
PUBLIC UTILITIES COMMISSION OF NEVADA
727 Fairview Drive
Carson City, NV 89701
(702) 687-6008

FRANK J. KELLEY
Attorney General
THOMAS L. CASEY
Solicitor General
DON L. KESKEY
HENRY J. BOYNTON
Assistant Attorneys
General
STATE OF MICHIGAN AND
MICHIGAN PUBLIC SERVICE
COMMISSION
6545 Mercantile Way,
Suite 15
Lansing, MI 48911
(517) 334-7650

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No. 97-804

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF STANISLAUS, a public entity; and MARY GROGAN, an individual; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC GAS & ELECTRIC COMPANY; PACIFIC GAS TRANSMISSION COMPANY and ALBERTA & SOUTHERN GAS COMPANY, LTD.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:
DONALD H. GLASRUD
TIMOTHY JOHN BUCHANAN
DIETRICH, GLASRUD & JONES
5250 North Palm, Suite 402
Fresno, California 93704
(209) 435-5250

M. LAURENCE POPOFSKY
Counsel of Record
MARIE L. FIALA
THOMAS E. REIBER
HELLER EHRMAN WHITE & McAULIFFE
333 Bush Street, Suite 3100
San Francisco, California 94104
(415) 772-6000

Attorneys for Respondents

72665 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTION PRESENTED

Does the filed rate doctrine bar a private antitrust claim under Section 1 of the Sherman Act brought by natural gas ratepayers against a regulated utility alleging that volumes of gas imported from Canada under a contract specifically found to be in the public interest and competitive by federal regulators were nonetheless anticompetitive?

RULE 29.6 STATEMENT

Pacific Gas and Electric Company ("PG&E") discloses that its parent company is Pacific Gas and Electric Corporation. Pacific Gas Transmission Company's ("PGT") parent company is Pacific Gas Transmission Corporation. Alberta and Southern Gas Co., Ltd.'s ("A&S") parent company is PG&E. PG&E's only nonwholly owned subsidiary is Standard Pacific Gas Line, Inc. PGT and A&S have no nonwholly owned subsidiaries.

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Respondents Pacific Gas and Electric Company ("PG&E"), Pacific Gas Transmission Company ("PGT") and Alberta and Southern Gas Co., Ltd. ("A&S") (collectively, "PG&E" or "Respondents") oppose Mary Grogan and the County of Stanislaus's (collectively, "Petitioners") Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

The Petition properly identifies the opinions below and Petitioners' basis for invoking this Court's jurisdiction.

STATUTORY PROVISIONS INVOLVED

Respondents agree that the statutes involved include 15 U.S.C. § 1, 15 U.S.C. § 8, 15 U.S.C. § 14, and certain provisions of the Natural Gas Act ("NGA"), including 15 U.S.C. § 717b. *See* Petition, Exhibit E. However, Respondents do not agree that the provisions of the Federal Power Act reproduced in Exhibit E — including 16 U.S.C. § 824, 16 U.S.C. § 824d (cited erroneously as 15 U.S.C. § 824d) and 16 U.S.C. § 824e (cited erroneously as 15 U.S.C. § 824e) — are involved.

INTRODUCTION

Petitioners are California ratepayers who sued PG&E in 1993, claiming that a decades-long price fixing conspiracy among PG&E, its subsidiaries and scores of Canadian natural gas producers injured them by inflating gas prices. The imported gas reached consumers through a series of transactions whose key price and volume terms were reviewed and approved by two federal regulatory agencies and the California Public Utilities Commission ("CPUC"). Petitioners ultimately bought the gas at regulatorily-filed rates. Because of this extensive

upstream regulatory review and approval, the Court of Appeals affirmed dismissal of the primary price fixing claims pursuant to a straightforward application of the filed rate doctrine.[1] The Petition does not contest this holding. Petition at 7 n.5. Nor does it question the wisdom or continuing vitality of the filed rate doctrine.

Petitioners also pled the theory that Respondents conspired to buy too much gas from the Canadian producers in order to fill the Canada-to-California pipeline, thereby preventing Petitioners from transporting their own independently-procured gas supplies to California. Dismissal of these so-called denial of access claims also was affirmed by the Court of Appeals under *Keogh*. Just as the *price* PG&E paid for gas had been federally-filed and approved as in the public interest, and therefore was deemed competitive, so had the precise *volumes* of gas imports.

Faced with these unexceptional holdings, Petitioners retreat from the theories pled below. Now, the Petition entirely recasts the "denial of access" claims as a challenge to PG&E's decision to purchase gas from a single, high-priced supply source in Canada rather than from some hypothetical, supposedly cheaper import alternative. This theory was never asserted in the District Court and was not fairly tendered to the Ninth Circuit, having been advanced only in Petitioners' reply brief and petition for rehearing. Since the "supply choice" issue does not arise on the District Court record and was not addressed by the Ninth Circuit, there is no plausible — let alone compelling — reason for this Court to consider it.

In any event, the supply choice claim articulated in the Petition is little more than a collateral challenge to the prudence of

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1. The filed rate doctrine traces its roots to *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922), and thus often is referred to as the *Keogh* doctrine.

PG&E's Canadian gas acquisition arrangements. That is the province of regulators, not antitrust tribunals. In the regulatory setting, the filed rate doctrine enforces federal preemption over wholesale energy regulation by disabling state regulators from second-guessing federal decisions. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) ("*MP&L*"). Under the Supremacy Clause, a state public utilities commission may not disallow a utility from recovering in rates its federally-approved wholesale energy costs. *Nantahala*, 476 U.S. at 970.[2]

By comparison, in antitrust jurisprudence the filed rate doctrine is concerned not with the demarcation between federal and state authority, but with the interplay between regulatory and antitrust policies. In that context, *Keogh* mandates that regulatory filing and approval conclusively establish rates or agreements as reasonable and lawful for antitrust purposes. *Keogh*, 260 U.S. at 162-63; *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). Thus, an antitrust plaintiff may not obtain treble damages when the alleged injury flows from payment of a filed rate; the legal rights of customers who pay filed rates are strictly limited to the rates themselves. *Id.*; *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 416 (1986).

Ignoring the critical distinction between the Supremacy Clause and antitrust branches of the filed rate doctrine, Petitioners seek *certiorari* on the basis of a supposed conflict between the opinion below and a multitude of federal and state court decisions, all of which involve only Supremacy Clause issues. The Ninth Circuit perceived no such conflict, and for good reason: not one of the

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2. The jurisdictional disputes that arose out of the construction of the Grand Gulf 1 nuclear power project in Port Gibson, Mississippi, with which this Court is familiar, fall into this category. *See MP&L*, 487 U.S. 354 (1988); *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350 (1989).

supposedly "conflicting" authorities is even an antitrust case, let alone a case where an antitrust challenge to a utility's allegedly anticompetitive selection of supply sources survived *Keogh* or even was raised. In any event, the holding here — that federal *filing* and *approval* of the specific volumes of gas imported by PG&E sufficed to bar a treble damages claim pursuant to *Keogh* — is consistent even with the Supremacy Clause cases.

COUNTER-STATEMENT OF THE CASE

PG&E is a regulated public utility that sells natural gas to residential, industrial and public users, including Petitioners, in northern and central California. Until 1993, PG&E bought gas from a pool of producers in Alberta, Canada pursuant to contracts entered into by its Canadian subsidiary, A&S, in compliance with Canadian federal and provincial law. At the United States-Canada border, A&S sold the gas to PGT, another PG&E subsidiary, which transported it to California via PGT's pipeline after obtaining required federal regulatory approvals of the gas import volumes and price. PGT then sold the gas to PG&E at the California border, and PG&E thereafter delivered it to consumers at rates reviewed and approved by the CPUC.

Both the District Court and the Court of Appeals considered the comprehensive federal regulation of PG&E's import arrangements — specifically, the Economic Regulatory Administration's ("ERA")[3] approval of the exact volumes of gas purchased from the exact source (A&S) at the exact prices

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3. ERA is an arm of the Department of Energy. It was the regulatory body responsible for regulating natural gas imports and exports across the United States international border at the time PG&E's relevant import arrangements were reviewed and approved. Respondents use the term "ERA" to refer to ERA and its successor, the Office of Fossil Energy, which assumed responsibility for natural gas imports in 1989.

alleged to have been anticompetitive — to be dispositive of Petitioners' claims under settled filed rate principles. However, the Petition omits any mention of the key regulatory history *specific to Respondents*. For that reason, this counter-statement details the operative import authorizations granted to Respondents which trigger application of *Keogh*.

A. The Federal Regulatory Framework: An Overview

When Congress enacted the NGA in 1938, it granted to the Federal Power Commission ("FPC") jurisdiction under Section 3 to regulate natural gas imports into the United States and to approve import arrangements unless they are not "consistent with the public interest." 15 U.S.C. § 717b(a). In 1977, the Department of Energy Organization Act transferred this authority to the Department of Energy ("DOE") which, in turn, issued delegation orders vesting Section 3 authority in ERA. Once ERA approved the terms on which gas entered the United States, jurisdiction passed to the Federal Energy Regulatory Commission ("FERC") to regulate the interstate transportation and sale of that gas. 15 U.S.C. § 717c.

In 1984, the Secretary of Energy issued guidelines to ERA designed to accommodate competitive market interests, regulatory concerns and international trade issues in assessing natural gas import arrangements. *New Policy Guidelines and Delegation Orders*, 49 Fed. Reg. 6684 (1984) (the "DOE Guidelines").[4] The DOE Guidelines provided that when determining whether a particular import arrangement was in the "public interest," ERA should consider the import's competitiveness in the market to be served, the need for the natural gas, and the security of the gas supply. *Id.*; *County of*

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4. The Petition erroneously attributes the DOE Guidelines to Congress. Petition at 9 n.7.

Stanislaus v. PG&E, 114 F.3d 858, 861 (9th Cir. 1997), Appendix A to Petition For Certiorari ("App."), at 7a. ERA also was directed to consider "international trade policy, foreign policy, and national security interests that may bear on an import authorization." DOE Guidelines, 49 Fed. Reg. at 6688. In implementing the DOE Guidelines, ERA presumed that the terms of a gas import arrangement were "prudent if they [were] freely negotiated and flexible, unless this presumption [was] rebutted." *TransCanada Pipelines Ltd. v. FERC*, 878 F.2d 401, 407-08 (1989). Thus, approval of an import arrangement subsumed a finding that the import arrangement was prudent and foreclosed any claim that the importer could have obtained a better deal elsewhere. *Id.* (the "argument that ERA does not consider prudence because it does not focus on whether the pipeline could have obtained gas elsewhere for less is, in reality, a policy disagreement" with ERA and the Secretary of Energy).[5]

In 1992, long after the regulatory approvals of PG&E's import arrangements, Congress amended the NGA by enacting the Comprehensive National Energy Policy Act ("EPAct"). Section 201 of the EPAct, 15 U.S.C. § 717b(c), altered the standard for ERA's review and approval of certain natural gas imports, providing that henceforth an import of natural gas from a nation with which a free trade agreement was in effect (which includes Canada) "shall be deemed to be consistent with the public interest." In so doing, Congress essentially codified the common sense presumption that buyers of imported natural gas (whether private parties or utilities subject to downstream rate regulation) would seek the best import terms, and expressed its

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5. It was during this time that ERA began issuing the "blanket authorizations" that are featured so prominently in the Petition. No such authorizations were granted to PG&E, and they played no part in the decision below.

judgment that such imports advanced the Nation's foreign trade policy. The EPAct did not alter the filed rate doctrine in any way.[6]

B. Federal Approval Of PG&E's Import Prices And Volumes

In 1984, PGT sought authorization from ERA to import natural gas destined for California consumers under a contract between A&S and PGT (the "International Contract"). On November 1, 1984, ERA conditionally approved PGT's application, but withheld final approval subject to a showing by PGT "that the import arrangement . . . is competitive in the Pacific Gas and Electric Company (PG&E) markets." *Re PGT*, 1 ERA ¶ 70,574 (1984). In assessing whether PGT's gas import arrangement served the public interest and was competitive in the California market, ERA was governed by guidelines which required it specifically to evaluate

> *the volume of gas under contract, base price*, price review or adjustment mechanisms, take-or-pay obligations, make-up provisions, length of the contract, and other terms which may affect marketability of the gas.

DOE Guidelines, 49 Fed. Reg. at 6688 (emphasis added).

ERA permitted interested parties to intervene in the proceeding to support PGT's application or to oppose it on any grounds, including that the International Contract might have anticompetitive consequences for the California market. Nineteen intervenors did so.[7] In April 1985, after considering all parties' positions, ERA

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6. By the same token, Congress confirmed that it did not intend to alter the existing jurisdictions of FERC or state public utilities commissions over natural gas transactions. *See* Petition at 24 (quoting bipartisan statement).

7. Six of the intervenors, who were affiliated with PG&E's major (Cont'd)

approved the International Contract and granted PGT an import authorization through 1993, concluding that "PGT's import arrangement is competitive and market-responsive." *Re PGT*, 1 ERA ¶ 70,591 (1985); *Stanislaus*, App. A at 7a; *Stanislaus*, App. B at 28a-30a. In order to ensure that the terms of the International Contract remained competitive, PGT was required to file public quarterly reports with ERA showing "the quantities of gas imported, the average price paid per MMBtu for both the demand and commodity components, and the average delivered price at the California border per MMBtu." *Re PGT*, 1 ERA ¶ 70,591, at 72,387. Any interested party was afforded the opportunity to oppose PGT's volumes and prices set forth in the quarterly reports, and ERA of course maintained jurisdiction to consider such issues on its own initiative. *See, e.g., Re PGT*, 1 FE ¶ 70,371 (1990); 10 C.F.R. § 590.407; *Stanislaus*, App. B at 28a-30a.[8]

ERA thus did not "rubber-stamp" PGT's application, as Petitioners suggest. Petition at 9. To the contrary, it carefully examined the International Contract, retained authority over the parties' performance thereunder, and consistently approved both

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(Cont'd)
domestic gas supplier, opposed PGT's application on the grounds that the proposed volumes of Canadian gas imports would adversely affect future domestic gas supplies. The CPUC, representing the interests of California ratepayers, intervened to express its support for the International Contract. *Re PGT*, 1 ERA ¶ 70,591, at 72,385-86; *Stanislaus*, App. B. at 28a.

8. In addition to the above-described ERA review and approval of PG&E's gas imports, FERC approved the sales contract between PGT and PG&E under a statutorily-prescribed "just and reasonable" standard, and regulated the terms on which PGT transported and sold gas to PG&E under that contract. *See Stanislaus*, App. A at 7a; 15 U.S.C. § 717c(c) (requiring regulated entities, including PGT, to file with FERC "schedules showing all rates and charges for transportation or sale subject to the jurisdiction of [FERC]. . . .").

the volumes and prices of PGT's gas imports throughout the relevant time period.[9]

C. The Proceedings Below

Petitioners filed this action in December, 1993, alleging that PG&E and PGT conspired with Canadian producers to fix the price of natural gas imported from Canada and sold to California consumers. That complaint was dismissed on filed rate and state action immunity grounds, with leave to amend. *See Stanislaus*, App. A at 9a. Petitioners duly amended the complaint, adding A&S as a defendant and alleging both price fixing and denial of access claims. The denial of access claims were predicated on the theory that Respondents conspired to fill the PGT pipeline to capacity, thereby denying Petitioners access to the pipeline to transport their own independently-procured gas to California. Again the District Court dismissed the price fixing claims on filed rate and state action immunity grounds, this time with prejudice. *Stanislaus*, App. B, at 43a-44a. The District Court also dismissed the denial of access claims on the same grounds and, in addition, for lack of standing, failure to plead a conspiracy and failure to file within the statute of limitations. *Id.* at 58a-63a. Finally, Petitioners' claim for injunctive relief was dismissed as moot, as Respondents had terminated the Canadian supply contracts at issue prior to the filing of the initial complaint. *Id.* at 63a-65a; *see also Stanislaus*, App. A at 6a n.2.

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9. Nor, as a general matter, did ERA "rubber stamp" all import applications. To the contrary, it had the authority to, and did, require pipelines to submit their import prices and any changes to contract terms for approval. Parties raised, and ERA considered, a myriad of complex issues, including contract terms, pipeline access, price competitiveness (indeed, some argued that prices were too low), allegations of discrimination, and the affiliated corporate structures of pipelines with suppliers or purchasers. *See, e.g., Re EnTrade Corp.*, 1 ERA ¶ 70,774 (1988); *Re Brooklyn Union Gas Co.*, 1 FE ¶ 70,285 (1991); *Re Mobil Gas Co., Inc.*, 1 ERA ¶ 70,745 (1988).

Petitioners appealed to the Ninth Circuit which affirmed the lower court's dismissal of the complaint.[10] The Court of Appeals found the price fixing claims barred by a routine application of *Keogh*. *Stanislaus*, App. A at 12a. It likewise agreed that the denial of access claims could not withstand *Keogh*: just as rates filed with ERA and FERC must be accepted as conclusively reasonable in an antitrust case, so must the volumes of gas filed with and approved by ERA. The Ninth Circuit reasoned that PG&E's import volumes, which ERA had determined to be competitive and thus "in the public interest," could not simultaneously cause any injury cognizable under the Sherman Act. *Id* at 13a-18a. The Court of Appeals also recognized that, however characterized, Petitioners' grievances actually reduced to the complaint that the rates they had paid were too high:

> [Petitioners sought] damages based on the difference between the rate paid for gas — a filed rate — and the rate potentially available from other Canadian producers. In reality, though framed as a challenge to access, this claim, too, is little more than a challenge to rates that FERC approved and filed for gas that PG&E imported, especially in light of [Petitioners'] failure to seek access to alternative suppliers of gas. The filed rate doctrine bars the denial of access claims.

Stanislaus, App. A at 18a.[11]

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10. Petitioners did not appeal dismissal of the denial of access claims for lack of standing or dismissal of the claim for injunctive relief.

11. Several state Public Utilities Commissions have appeared as *amici* in support of Petitioners, apparently out of a concern that certain language employed by the Court of Appeals suggests limits on their jurisdiction where international imports are concerned. However, as is clear from its opinion, the Ninth Circuit was not presented with and did

(Cont'd)

THE PETITION PRESENTS NO CREDIBLE CONFLICT OR IMPORTANT ISSUE OF FEDERAL LAW

1. The Petition does not question the continuing vitality of *Keogh*, which bars treble damages recovery by parties claiming injury by virtue of paying a filed rate for goods or services. *See Keogh*, 260 U.S. at 163 (reasoning that plaintiff can suffer no "antitrust injury" by payment of a filed rate since legal rights are defined solely by that rate). Although *Keogh* has had its critics over the years, Petitioners do not invite this Court to dismantle what has been "an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6½ [now 7½] decades." *Square D*, 476 U.S. at 423.[12] The issue sought to be reviewed thus concerns only the particular application of *Keogh* to this case.[13]

(Cont'd)
not decide the extent of state public utilities commissions' jurisdiction or whether the NGA divests them of authority to review the prudence of a utility's international supply choices. *Compare* Petition at 23-24. Respondents submit that not only are *amici's* fears vastly overblown, but that the existence of assertedly imprecise dicta about an issue not presented is scarcely grounds for granting *certiorari*.

12. The lower courts repeatedly have reaffirmed and applied *Keogh*. *See, e.g., Sun City Taxpayers v. Citizens Utils.*, 45 F.3d 58 (2d Cir.), *cert. denied*, 514 U.S. 1064 (1995); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992); *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir.), *cert. denied*, 506 U.S. 1021 (1992).

13. The Petition inflates the significance of the decision below to antitrust enforcement, asserting that it signals the demise of antitrust litigation by private parties and the DOJ and predicting that utilities throughout the nation will travel across the international border into Canada to flout the antitrust laws "with impunity." Petition at 12. But volumes have been at issue in only a handful of cases, which arose in the

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2. The Petition also raises no issue concerning the price fixing claims which formed the centerpiece of both complaints below: "Petitioners do not contest the Ninth Circuit's holding that their price-fixing claims are barred by the filed rate doctrine." *See* Petition at 7 n.5. The Petition makes this concession without regard to the fact that ERA did not "mandate" payment of any particular price for PG&E's gas imports. ERA approved the International Contract as a whole, not a price *per se*. In fact, the ERA-approved International Contract contained *flexible pricing terms*, including provisions for periodic price redeterminations that enabled the price of the gas to remain competitive over the duration of the contract. *See supra* at 7-8. As a result, the prices PG&E filed with ERA were in no meaningful sense "mandated." Yet that regulatory action unquestionably was sufficient to require dismissal of the price fixing claims under *Keogh*, as Petitioners now concede. *Square D*, 476 U.S. at 414, 417-23; *Montana-Dakota*, 341 U.S. at 251-52. Nonetheless, the Petition postulates a distinction between volumes and price on the ground that the volumes imported were not "mandated" by ERA. But what PG&E was required to and did obtain was a "competitiveness" finding from ERA as to the *entire* International Contract, including both the import volumes and price. Given that the regulatory process and result were one and the same, the price and volume terms of the International Contract are indistinguishable for purposes of applying *Keogh*.

3. Drawing a distinction between price and volumes would enable antitrust litigants to skirt *Keogh* by disguising a challenge

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regulatory context. Price surely matters more, yet *Keogh*'s application in the international sphere has scarcely brought the Sherman Act to its knees. In any event, *Keogh* only bars private treble damages actions. *See Square D*, 476 U.S. at 422 (addressing and rejecting argument that *Keogh* is an immunity doctrine). It does not bar claims for injunctive relief, like that raised by Petitioners below which was dismissed as moot. *Id.* Nor does it bar criminal or civil enforcement actions by the DOJ. *Id.*

to rates as a "supply choice" issue. Ratepayers dissatisfied with federal or state regulatory results would need only to allege that the rate they paid would have been lower had their utility but purchased cheaper power from a different source. As the Court of Appeals recognized, that is exactly what Petitioners tried to do here.[14] If Petitioners' claim truly were that PG&E should have bought cheaper gas from different sources, the only cognizable injury they could have suffered would have been payment of a rate that allegedly was too high. That, in turn, brings Petitioners full circle back to a claim that is barred by *Keogh*.

4. The proffered conflict between the Court of Appeals' decision and the decisions of other federal and state courts is entirely illusory. Literally *none* of Petitioners' supposedly "conflicting" cases involves the antitrust application of the filed rate doctrine, let alone holds that an antitrust claim premised on a utility's anticompetitive selection of supply sources survives *Keogh*.

The only "conflict" or confusion emanates from the Petition itself. As described above, the filed rate doctrine has diverged into two distinct branches over the years — in the antitrust and Supremacy Clause contexts — each driven by different considerations.[15] It is from the Supremacy Clause cases alone

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14. *See Stanislaus*, App. A at 16a ("[N]o matter what the reality of the alleged anticompetitive behavior, plaintiffs here would still be paying PG&E's rates. That those rates could theoretically be lower is precisely what compels application of the filed rate doctrine.").

15. Of course, the two branches of filed rate jurisprudence share a common definition of what constitutes a "filed rate" sufficient to invoke application of the doctrine. As the doctrine has evolved over the years, it no longer is "limited to 'rates' *per se*, but applies to any activity under the controlling agency's regulatory power." *Stanislaus*, App. B at 44a; *Nantahala*, 476 U.S. at 973; *MP&L*, 487 U.S. at 374-75. It therefore was entirely appropriate for the Ninth Circuit to rely on *Nantahala*, a

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that Petitioners derive the supposed distinction between "permissive" approvals and "mandatory" agency orders which forms the central thesis of the Petition. *See, e.g.*, Petition at 13 ("the *sine qua non* of the filed rate doctrine is a regulatory agency's mandate; if no regulatory agency has mandated the purchasing decision, the doctrine is not implicated."). But to the extent the mandatory-permissive distinction has found any home, it is only within a narrow exception to preemption principles — the *Nantahala* or *Pike County* exception[16] — that in limited circumstances allows a state commission to examine a utility's energy supply choices made at or within the State's borders. The exception embodies a particularized attempt by courts to reconcile the boundaries of federal wholesale regulation and state retail rate regulation. But it has no place in federal antitrust jurisprudence, where the filing of a rate or agreement definitively establishes the legal rights of all parties and bars a private treble damages action. Not even the courts that have applied the *Nantahala* exception have suggested that the ratemaking functions of federal and state regulators be handed over to private litigants and the courts. The Court of Appeals saw no reason to incorporate the Supremacy Clause analysis into the antitrust laws, and the Petition offers none.

5. Even assuming that a distinction may be drawn between

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Supremacy Clause case, in answering the threshold question whether ERA review and approval establishes an import volume as conclusively reasonable in the same manner as it does an import price.

16. While this Court has acknowledged the existence of the exception in the regulatory ratemaking context, it has never "agreed" with or "supported" it. Moreover, those references clearly were limited to prudence issues. *Nantahala*, 476 U.S. at 972-73; *MP&L*, 487 U.S. at 373-74. *Compare* Petition at 4, 15. This Court has never even mentioned the exception in the antitrust setting.

permissive and mandatory agency orders of various types, it is inoperative here because ERA's approval of the terms and conditions of the International Contract was no less "mandatory" than the federal regulatory approvals held preemptive in *Nantahala*. The International Contract specifically approved by ERA as competitive and in the public interest obligated Respondents to import full volumes of gas (the same volumes that allegedly filled the pipeline to Petitioners' detriment) so long as the gas was competitive in PG&E's market. This is no different in kind from the facts of *Nantahala*, where two related power companies voluntarily filed a contract with FERC allocating the rights to purchase high and low cost power between themselves. FERC adjusted the parties' contract to ensure that the rates charged were "just and reasonable," but did not "mandate" that either company enter into the contract in the first place or actually take power thereunder. The filed rate doctrine nonetheless applied. Here, ERA's approval of the International Contract "mandated" that the parties comply with its terms to the same extent as FERC's approval of the contract in *Nantahala* "mandated" an allocation of power. The Ninth Circuit therefore correctly found that *Keogh* barred any claim that the actual import of those volumes was "anticompetitive."

But that said, the mandatory-permissive distinction advanced in the Petition was not urged in the District Court as a grounds for sustaining Petitioners' denial of access claims. As a result, no meaningful record regarding any of the factual issues relevant to Petitioners' latest hypothesis was developed there. Nor was the argument fairly put to the Ninth Circuit as a ground for reversal; consequently it is not addressed in the opinion below. It makes little sense for this Court to decide an issue that has undergone no analysis, legal or factual, in the lower courts.

6. The dismissal of the denial of access claims comports with national competition policy. During the relevant time period, ERA

adjudged PG&E's import arrangement to be in the public interest and competitive. *See supra* at 7-8. By definition, a comparable finding would have to have been made as to any supposedly cheaper supply alternatives allegedly available to PG&E in the Canadian market. Such regulation leaves no room for the antitrust laws to impose an additional (and potentially different) standard of competitiveness on import decisions. While we do not believe that a choice made among federally-approved and competitive supply sources is a proper issue for state regulators under prudence review,[17] it certainly is not one that should be adjudicated under the antitrust laws, let alone in the international context. Put otherwise, an antitrust claim cannot be extracted out of choices made among supply sources that are or must be federally approved as competitive. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981); *H.J., Inc.*, 954 F.2d at 492-94; *Wegoland*, 27 F.3d at 21.[18]

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17. PG&E challenged the CPUC's authority to review the prudence of its federally-approved Canadian natural gas acquisition arrangements in a separate lawsuit filed in the Northern District of California. *Pacific Gas and Elec. Co. v. California Pub. Utils. Comm'n*, Civil No. 94-4381 FMS (N.D. Cal.). The CPUC defended its authority on the identical grounds raised in the Petition. PG&E obtained a preliminary injunction against enforcement of a CPUC order disallowing its federally-approved gas costs, and argued in a motion for summary judgment that the *Stanislaus* decision put to rest the CPUC's argument that it was authorized to conduct a prudence review of PG&E's Canadian gas acquisitions. PG&E ultimately agreed to dismiss its case as part of a global settlement of numerous proceedings pending before the CPUC. An appeal from a final judgment in that action would have raised the very regulatory issue that has been dressed up as an antitrust issue in the present Petition. Now it is a matter for another day.

18. The Petition devotes four pages to an invitation to the Court to interpret the NGA and decide whether ERA has jurisdiction to review the prudence of a utility's purchasing decisions. Petition at 23-26. These issues plainly were neither raised nor decided below, and equally plainly pose no antitrust issue. But in any event, the quoted legislative history

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7. The changes in regulation of the natural gas industry over the past two decades do not vitiate *Keogh*, as the Petition asserts.[19] This Court already has concluded that unless expressly overridden by Congress, *Keogh* retains its full force and effect after an industry's deregulation:

> Similarly, Petitioners and the Solicitor General argue that private treble-damages actions would further the congressional policy of promoting competition in the transportation industry reflected in the Motor Carrier Act of 1980. We may assume this is the case — indeed, we may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy — but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980.

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does not support Petitioners' assertion that Congress has granted the several States authority to review a utility's purchasing decisions among choices in international commerce. Nor have ERA or FERC disclaimed jurisdiction to review PG&E's choices among various supply sources in Canada, as that issue has not been tendered to those agencies. *Compare* Petition at 25. Each of the regulatory orders cited in the Petition recognizes that state regulators are limited to reviewing supply choices made at the State's border, not across international borders.

19. Respondents quite agree that, after approval of the International Contract, ERA adopted a presumption of competitiveness when evaluating import applications and a policy of granting "blanket authorizations," and that Congress subsequently codified ERA's presumptions and policies when it enacted the EPAct. *See supra* at 5-7. But none of these matters is relevant to the issues presented here.

Square D, 476 U.S. at 419-20. Congress made no changes to *Keogh* when it set about deregulating the natural gas market; *Keogh* applies as and when appropriate. In any event, these considerations scarcely distinguish volume from price and thus present no intellectually coherent basis for review.

8. The Petition does not raise any issues of ongoing concern that warrant this Court's attention. Petitioners' quarrel with the Court of Appeals' decision is with *Keogh*'s unique application to international commerce. Such ERA-approved import arrangements have rarely raised antitrust issues and are unlikely to do so in the future. Subsequent to the alleged conduct giving rise to this lawsuit, Congress passed the EPAct and the North American Free Trade Agreement, and federal and state regulators have undertaken the deregulation of other energy markets. The issues specific to PG&E's supply arrangements (which were terminated more than four years ago) are historic remnants of the deregulation of the natural gas market, and simply devoid of continuing significance to the evolving competitive landscape. *See* Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-67 (1953) (citing cases wherein *certiorari* denied despite a square conflict because issues no longer alive).

9. *Keogh* was but one of many procedural and substantive grounds that mandated dismissal of the denial of access claims. The Court of Appeals did not reach or was not asked to consider many of the separate and independent grounds upon which the District Court dismissed the denial of access claims in addition to *Keogh*, including: (i) state action immunity (*Stanislaus*, App. B at 50a-58a); (ii) Petitioners' lack of standing (*id.* at 58a-62a); (iii) failure to plead a conspiracy (*id.* at 63a); and (iv) failure to file within the statute of limitations (*id.* at 65a-67a). This fact further underscores that the Petition does not warrant this Court's attention. Since the outcome below likely would be unaffected by a reversal on the filed rate issue tendered by Petitioners, there

is no compelling reason for this Court to consider this controversy in order to achieve a "just result."

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

M. LAURENCE POPOFSKY
Counsel of Record
MARIE L. FIALA
THOMAS E. REIBER
HELLER EHRMAN WHITE
& McAULIFFE
333 Bush Street, Suite 3100
San Francisco, California 94104
(415) 772-6000

Of Counsel:

DONALD H. GLASRUD
TIMOTHY JOHN BUCHANAN
DIETRICH, GLASRUD & JONES
5250 North Palm, Suite 402
Fresno, California 93704
(209) 435-5250

Attorneys for Respondents

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No. 97-804

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF STANISLAUS, a public entity; and MARY GROGAN, an individual; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC GAS & ELECTRIC COMPANY; PACIFIC GAS TRANSMISSION COMPANY and ALBERTA & SOUTHERN GAS COMPANY, LTD.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Of Counsel:
DONALD H. GLASRUD
TIMOTHY JOHN BUCHANAN
DIETRICH, GLASRUD & JONES
5250 North Palm, Suite 402
Fresno, California 93704
(209) 435-5250

M. LAURENCE POPOFSKY
Counsel of Record
MARIE L. FIALA
THOMAS E. REIBER
HELLER EHRMAN WHITE & McAULIFFE
333 Bush Street, Suite 3100
San Francisco, California 94104
(415) 772-6000

Attorneys for Respondents

72665
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

RULE 29.6 STATEMENT

Pacific Gas and Electric Company ("PG&E") discloses that its parent company is Pacific Gas and Electric Corporation. Pacific Gas Transmission Company's ("PGT") parent company is Pacific Gas Transmission Corporation. Alberta and Southern Gas Co., Ltd.'s ("A&S") parent company is PG&E. PG&E's only nonwholly owned subsidiary is Standard Pacific Gas Line, Inc. PGT and A&S have no nonwholly owned subsidiaries.

Pacific Gas and Electric Company ("PG&E"), Pacific Gas Transmission Company ("PGT") and Alberta and Southern Gas Co., Ltd. ("A&S") (collectively, "PG&E" or "Respondents") respond to the Brief *Amicus Curiae* of States in Support of Petitioners ("*Amicus* Brief") as follows:

1. Like Petitioners, *Amici* brief an issue that was neither tendered to nor decided by the Court of Appeals. *See Amicus* Brief at 16 (summarizing question presented as "whether a State may evaluate the prudence of a retailer's decision to buy a particular quantity of gas from one federally-approved source as opposed to another"). No issues regarding the proper scope of state prudence review were presented below. Rather, the Court of Appeals decided that, pursuant to *Keogh*, federal regulatory review and approval of PG&E's gas import prices and volumes required dismissal of private antitrust claims brought by ratepayers. *See* Respondents' Brief in Opposition ("R. Br.") at 1-2, 10; *County of Stanislaus v. PG&E*, 114 F.3d 858 (9th Cir. 1997), Appendix A to Petition For Certiorari ("App.") at 4a. The fact that the *Amicus* Brief does not cite a single antitrust case and, instead, confines itself to federal-state preemption cases confirms that the proffered "conflict" is illusory. *See* R. Br. at 13-14.

2. *Amici* erroneously equate state regulatory prudence review with judicial antitrust review in arguing that the Court of Appeals' decision may tie the hands of state regulators. *See, e.g., Amicus* Brief at 6 (in dismissing antitrust case, Ninth Circuit "may also have abrogated the State's authority"); 15 (decision allows utilities to evade review under antitrust laws "and arguably under state regulatory laws."). The two subjects are analytically distinct. State prudence review focuses not on whether a regulated local utility harmed competition (a utility, after all, historically was a lawful monopolist), but on whether it made reasonable choices among energy supplies available at or within the State's borders. Since prudence review usually gives rise to filed rate and state action

defenses, a utility's purchasing choices typically are not subject to antitrust scrutiny.[1] An antitrust action like this one thus implicates different concerns than a state prudence review case. It is not the proper vehicle for adjudicating federal preemption limits on state regulatory jurisdiction, particularly as no meaningful record regarding such issues was developed in the District Court or Court of Appeals.[2]

3. *Amici* ask this Court to resolve a purported conflict between dicta. While *amici* admit that this Court's acknowledgment of the *Nantahala* (or *Pike County*) exception to the filed rate doctrine is dicta, they nonetheless ask the Court to determine what consequences the Ninth Circuit's discussion of this dicta might have for state regulatory jurisdiction prospectively. *Amicus* Brief at 5; *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986). Respondents submit that the potential impact of a discussion of dicta — which itself is dicta — on hypothetical future controversies provides no basis on which to grant certiorari.[3]

4. In any event, *Amici* incorrectly assert that the decision below deprives state regulators of preexisting jurisdiction over a utility's

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1. Although the Court of Appeals reached only the *Keogh* issue, the District Court dismissed this case both on filed rate and state action grounds. R. Br. at 9-10.

2. *Amici* complain that the Court of Appeals refused to consider regulatory materials regarding the jurisdictional issues pressed in their brief — materials never even tendered to the District Court. *Amicus* Brief at 3 n.3. The Ninth Circuit declined to consider such materials precisely because they were irrelevant to the *antitrust* issues involved here.

3. *Amici* implicitly acknowledge that their articulated concerns are hypothetical at this point. *See, e.g., Amicus* Brief at 1 (decision "could seriously compromise" state authority), 18 (decision "jeopardizes" state authority and "place[s] at serious risk the vital interests of States").

purchasing decisions in foreign commerce. The Natural Gas Act expressly limits state regulatory jurisdiction to reviewing a local utility's purchasing choices made *at or within a State's border*; state jurisdiction does not extend across the international border into Canada. 15 U.S.C. § 717(b), (c) (Hinshaw Amendment preserves state jurisdiction only over "natural gas received by [a utility] . . . within or at the boundary of a State"). Energy imports into the United States raise issues of purely federal concern and therefore are subject to exclusive federal jurisdiction. *TransCanada Pipelines, Ltd. v. FERC*, 878 F.2d 401, 407-08 (D.C. Cir. 1989) (in international commerce, federal approval of an import subsumes a finding of prudence that may not be challenged by downstream agency review). None of *amici's* regulatory authorities even considers, let alone acknowledges, the supposed jurisdiction of a state commission to review the prudence of supply choices made in foreign commerce.[4] *See also* R. Br. at 16-17 n.18.

5. This litigation concerned a retrospective antitrust challenge to import arrangements that were approved by ERA in 1984 and were terminated by PG&E in 1993. Since then, the competitive landscape has been profoundly altered by the Energy Policy Act of 1992 and the deregulation of the natural gas market. Because emerging competitive forces in the natural gas and electric services industries will fundamentally alter the roles of local utilities and their regulation by state commissions in the years ahead, the concerns expressed by *Amici* are transitory. Any collateral impact the Court of Appeals' decision may have had on a historic regulatory issue has no prospective significance, making this a case whose time has passed.

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4. To the contrary, the cited cases recognize that, as required under the Natural Gas Act, state authority is limited to reviewing utility purchasing choices among supply alternatives available *at or within the State border* — although such choices may involve comparing imported Canadian gas with gas from other United States supply basins or from intrastate sources.

CONCLUSION

For the foregoing reasons and the reasons set forth in Respondents' Brief in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

M. LAURENCE POPOFSKY
Counsel of Record
MARIE L. FIALA
THOMAS E. REIBER
HELLER EHRMAN WHITE
& McAULIFFE
333 Bush Street, Suite 3100
San Francisco, California 94104
(415) 772-6000

Of Counsel:

DONALD H. GLASRUD
TIMOTHY JOHN BUCHANAN
DIETRICH, GLASRUD & JONES
5250 North Palm, Suite 402
Fresno, California 93704
(209) 435-5250

Attorneys for Respondents

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

MICHAEL H. KRAUSNICK
COUNTY OF STANISLAUS
Administration Building
1110 H Street
Modesto, CA 95354
(209) 525-6376

JOSEPH W. COTCHETT
BRUCE L. SIMON*
COTCHETT & PITRE
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

ROGER SCHRIMP
LISA L. GILLISPIE
DAMRELL, NELSON, SCHRIMP,
PALLIOS & LADINE
1601 I Street, Fifth Floor
Modesto, CA 95354
(209) 526-3500

Attorneys for Petitioners

* *Counsel of Record*

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QUESTION PRESENTED

Where, in violation of the antitrust laws, a monopoly utility voluntarily decides to purchase its imported natural gas supplies almost exclusively from an affiliated company who contracted with an illegal cartel, to the exclusion of lower-cost sources, does the fact that the United States Economic Regulatory Administration (ERA) had *permissively* approved the volume of natural gas imported from Canada conclusively establish the reasonableness of the utility's decision to purchase from only one available source, such that the "filed rate doctrine" bars any antitrust challenge to the utility's conduct?

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Mary Grogan, an individual, and County of Stanislaus, a public entity, Petitioners herein, respectfully submit this reply brief in support of their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

ARGUMENT IN REPLY TO OPPOSITION BRIEF

In the Court of Appeals below, the Ninth Circuit held that a monopoly public utility which imported its natural gas solely from its foreign affiliates may seek shelter behind the filed rate doctrine, even though federal regulators did not order the utility to purchase the gas from any particular source. Rather, the relevant federal agency permitted the utility to make a free-market selection among all available and federally-approved sources, *assuming* that the purchaser would select the lowest-price source.

In this case, the relevant federal regulatory agency approved many possible sources from which respondent Pacific Gas & Electric Company ("PG&E") could import natural gas supplies. However, respondent PG&E abused the free market by purchasing solely from its foreign affiliates, even though lower-cost gas was also available and had also been approved by the federal regulators.

The filed rate doctrine does not license a utility to engage in voluntary collusive conduct by doing business only with its foreign affiliates, to the exclusion of lower-cost supplies. Where conduct is mandated by federal agencies, the filed rate doctrine applies. Where, as here, the conduct was *discretionary* with the utility, the filed rate doctrine does not bar a private antitrust action by injured customers.

I.

ERA APPROVED THE INTERNATIONAL CONTRACT BECAUSE IT PERMITTED "FLEXIBILITY" IN SOURCE SELECTION; IT NEVER DEEMED "COMPETITIVE" RESPONDENTS' SUBSEQUENT PURCHASE OF *ALL* OF THEIR CANADIAN GAS FROM AFFILIATES.

Respondents' Question Presented incorrectly states that the International Contract between respondents Pacific Gas Transmission Company ("PGT") and Alberta & Southern Gas Company, Limited ("A&S") was found to be "competitive" by federal regulators, as if such approval meant that respondent PGT was entitled to import *all* of its natural gas from its affiliate, respondent A&S. However, the Economic Regulatory Administration ("ERA") approved the International Contract because of its "flexibility" and *because it permitted PGT to be "market responsive." Pacific Gas Transmission Co.*, 1 ERA ¶ 70,591 at p. 72,386 (1984). ERA approved the International Contract because the Contract permitted PGT to import from other sources, and ERA assumed that a "market-responsive" natural gas importer would seek out the lowest price, not the highest.[1] ERA's goal was to ensure that "applicants and their agents will face *competition* from others obtaining the ERA authorizations. . . ." *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 847 F.2d 1168, 1177 (5th Cir. 1988) (emphasis added).

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1. The underlying assumption on ERA's part is that purchasers will buy the lowest-priced approved volumes. ERA assumed that:

> if the terms were flexible enough (allowing the price to move down and the importer to reduce volumes), no gas would be imported unless it were priced competitively.

Panhandle Producers v. Economic Regulatory Admin., 822 F.2d 1105, 1113 (D.C. Cir. 1987).

ERA's approval of numerous other natural gas imports provided Respondents with the option to purchase natural gas from a broad range of suppliers. *See, e.g., Salmon Resources, Ltd.*, 1 ERA ¶ 70,749 (1988); *Development Assoc., Inc.*, 1 ERA ¶ 70,765 (1988); *Amoco Energy Trading Corp.*, 1 ERA ¶ 70,772 (1988); *Kerr McGee Chem. Corp.*, 1 ERA ¶ 70,840 (1989). In spite of this array of sources approved by the ERA, respondent PG&E voluntarily chose to purchase nearly all of its Canadian gas from its affiliates, thereby filling the PGT interstate pipeline and precluding other end users from purchasing lower-cost Canadian supplies. PG&E's incentive was to engage in collusive, market-preclusive contracts with its affiliates, to the injury of natural gas consumers.

Thus, the ERA's determination that the International Contract was "competitive" merely meant that approving an array of volumes for import was pro-competition; it was not a judgment that, if Respondents were subsequently to purchase Canadian natural gas *solely* under the inter-affiliate contract, such conduct would be deemed "competitive" such that it barred any challenge to the purchasing decision. Therefore, Respondents' choice to buy nearly all of its imported natural gas from a cartel is not immune from the antitrust laws.

Respondents state several times in their Opposition Brief that ERA approved the "precise" prices and volumes of the Canadian natural gas that respondent PG&E purchased pursuant to the contracts with its affiliates. No matter how many times Respondents repeat the point, they are still wrong. Indeed, this much is admitted at one point in the Opposition Brief.[2] In fact, once ERA had approved the International Contract, due to its flexibility, *ERA never made a specific determination thereafter*

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2. "ERA approved the International Contract as a whole, not a price *per se*." Respondents' Opposition Brief at 12.

as to the reasonableness of the subsequent prices and volumes of gas that respondent PGT imported and PG&E subsequently purchased.[3] Rather, Respondents were merely required to lodge quarterly and annual reports with ERA. Those reports were not an ERA mandate that PG&E purchase the gas at all — much less at any precise price or volume.[4]

Accordingly, the question presented by the instant Petition was properly phrased, but erroneously answered, by the Ninth Circuit. The Court of Appeals below held that the central question was whether "ERA-approved volumes are conclusively reasonable," *County of Stanislaus*, App. A at 13a, such that respondent PG&E could freely purchase *all* of its natural gas from a single affiliated source, to the exclusion of all other approved sources, because the filed rate doctrine "forecloses *any* challenge to importation volumes." *Id.* at 13a (emphasis added). Public utilities are encouraged by this erroneous decision to seek ERA import authorizations from only one source — their

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3. Even if ERA had approved "precise" volumes and prices (which it did not), this would be irrelevant to the application of the filed rate doctrine. Assuming *arguendo* that ERA had approved precise volumes and prices, PGT would still have been free to choose voluntarily whether to purchase those volumes at those prices. The filed rate doctrine only immunizes conduct *mandated* by the regulators; under the *Nantahala* exception, the doctrine does not immunize conduct that is *discretionary* with the utility. *Nantahala*, 476 U.S. at 972; *MP&L*, 487 U.S. at 373–374.

4. Respondents contend that interested parties were afforded the opportunity to oppose the prices and volumes reflected in the quarterly and annual reports cited by Respondents. This is false. Once ERA had approved the amended International Contract in 1984 — the document which merely *permitted* PGT to import the gas if it chose — *no one had any opportunity to oppose the quarterly reports filed by PGT thereafter*, and "the ERA never made any findings as to whether these new rates were in the public interest." *Re Pacific Gas & Elec. Co.*, 137 Pub. Util. Rep. 4th 346, 353 (Cal. P.U.C. 1992).

high-cost foreign affiliates. Under the *County of Stanislaus* rule, neither an antitrust action nor a state public utility commission may review such anticompetitive conduct. This behavior should not have been immunized by the Ninth Circuit.

II.

THE REGULATION OF NATURAL GAS IMPORTS DOES NOT INCLUDE ANY MANDATE THAT RESPONDENTS PURCHASE SOLELY FROM THEIR FOREIGN AFFILIATES.

ERA expressly stated that it approved the International Contract between respondents PGT and A&S because of the "flexibility" which the International Contract gave the purchaser to be "market-responsive" and to purchase from among *competing* supplies. *Pacific Gas Transmission Co.*, 1 ERA ¶ 70,591 at p. 72,386 (1984). To permit respondent PGT to ignore all competing sources, and to allow it to purchase its Canadian natural gas solely from its affiliates, would render meaningless ERA's approval of the International Contract on the ground that it permitted PGT to be "market-responsive."

Respondent PG&E was by no means required to purchase its natural gas from its affiliates. Indeed, in 1984, the Federal Energy Regulatory Commission ("FERC") eliminated respondent PG&E's "minimum take" obligation under its service agreement with respondent PGT, such that PG&E had discretion whether or not to purchase any of PGT's volumes. Order 380-A, FERC Stats. & Regs. 1982-1985 ¶ 30,584 at p. 31,061 (1984), *aff'd, Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). Then, in 1990, FERC eliminated PG&E's 50% "minimum bill" obligation, such that PG&E was not required to pay for PGT's gas supplies. *Pacific Gas Transmission Co.*, 50 FERC ¶ 61,067 at p. 61, 132 (1990).

Under the terms of the amended International Contract approved by ERA, and as a result of both FERC orders, PG&E was free to purchase no gas at all from PGT or A&S, yet PG&E purchased the most expensive gas in Canada almost exclusively from its wholly-owned subsidiaries.

Where a utility has purchased virtually all of its imported natural gas from one ERA-approved source, and has not been *ordered* to choose that particular source by any agency, the utility should not find shelter from the antitrust laws in the filed rate doctrine.

III.

THE PREVAILING FEDERAL LAW REQUIRES THAT THE NINTH CIRCUIT'S DECISION BE OVERTURNED.

In their Opposition Brief, Respondents argue that Petitioners incorrectly apply this Court's interpretation of the filed rate doctrine in *Nantahala* to the antitrust realm. However, it was the Ninth Circuit, not Petitioners, who linked *Nantahala* to Petitioners' private antitrust case. It was the Ninth Circuit that further held that this Court intended *Nantahala* to mean that a utility may choose to purchase all of its natural gas from the highest-priced available source, without "*any* challenge," App. A at 13a, so long as a federal agency had once approved that particular volume (among many others) for purchase. It was the Ninth Circuit that relied almost exclusively on an erroneous interpretation of *Nantahala* to bar Petitioners' market preclusion claims.[5] This Court should correct the Ninth Circuit's erroneous

5. Petitioners do not address their Petition to their claims for price-fixing below. Instead, they address this Petition to the incorrect application of *Nantahala* and the filed rate doctrine to bar their market preclusion claims *only*, claims which have been at issue since the inception of the case despite Respondents' assertion to the contrary. *See* First Amended Complaint, CR 61 ¶¶ 4, 64–69, 107–134.

holding that the filed rate doctrine bars Petitioners' claims for market preclusion.

Moreover, Respondents' contention that the Ninth Circuit's opinion was narrow, and that its handling of *Nantahala* was merely *dicta*, is unsupported by the opinion below. The Ninth Circuit held:

> Guided by Supreme Court precedent, the complimentary jurisdiction of ERA and FERC, and the Supremacy Clause, we *hold* that ERA approval establishes an import volume as conclusively reasonable and thereby forecloses *any challenge* to importation volumes.

App. A at 13a (emphasis added). This is neither *dicta* nor narrow in scope.

The majority of circuits, and this Court *in dicta*,[6] have agreed that under the *Nantahala* exception, the filed rate doctrine does not shield a utility's anticompetitive selection of energy sources, except where the utility has been *ordered* to select a particular source.

> Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility **from a particular source** could be deemed unreasonably excessive **if lower cost power is available elsewhere**, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price.

Nantahala, 476 U.S. at 972 (boldface added, italics in original).

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6. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 373–374 (1988).

In *MP&L*, as in *Nantahala*, this Court did not address the merits of the issue left open in *Nantahala*, since it also involved a FERC mandate that the electric utility purchase a specific quantity of power from a particular source. The *MP&L* Court did, however, clarify its *dicta* in *Nantahala*:

> As we assumed, *it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power*, even at FERC-approved rates, if it had the legal right to refuse to buy that power. . . . Just as Nantahala had no legal right to obtain more low-cost TVA power than the amount allocated by FERC, it is equally clear that MP&L may not pay for less Grand Gulf power than the amount allocated by FERC.

MP&L, 487 U.S. at 373–74 (emphasis added). Whether the issue arises in the context of a private antitrust case or any other context, the rule of these cases is clear: if a utility is *ordered* to purchase from one source, to the exclusion of lower-cost supplies, the filed rate doctrine bars review of that conduct; if, on the other hand, a utility has a legal right to purchase its power from among many alternative sources, the filed rate doctrine does not shield a review of the utility's decision to purchase exclusively from one high-cost source. This is especially true where the utility formed an illegal cartel to accomplish this purpose. *See* CR 61 ¶¶ 36–42.

At least four other circuits have concluded that the filed rate doctrine does not bar a challenge to a utility's voluntary decision to purchase a particular quantity of power from a particular source when other lower-cost supplies are available and have been approved by the regulatory agency. *See Kentucky W. Virg. Gas Co. v. Penn. Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988), *cert. denied*, 488 U.S. 941 (1988) ("*Kentucky West*

I"); *Kentucky W. Virg. Gas Co. v. Penn. Pub. Util. Comm'n*, 862 F.2d 69 (3d Cir. 1988) ("*Kentucky West II*"); *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. dism'd*, 502 U.S. 954 (1991) ("*NOPSI III*"); *Appalachian Power Co. v. Public Serv. Comm'n of W. Virginia*, 812 F.2d 898 (4th Cir. 1987); *Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987).

Respondents' Opposition Brief has nothing to offer the Court on these cases except overwhelming silence. Rather, Respondents attempt to paint this circuit conflict merely as a distinction between antitrust cases and Supremacy Clause cases. However, *the Ninth Circuit drew no such distinction* when it used "Supreme Court precedent [*i.e.*, *Nantahala*], the complimentary jurisdiction of ERA and FERC, and the Supremacy Clause" to bar plaintiffs' antitrust market preclusion claims. App. A at 13a. The Ninth Circuit created the conflict in *all* contexts in which the filed rate doctrine applies when it reduced *Nantahala* and *MP&L* — and their distinction between *mandated* conduct and *permitted* conduct — to nothing.

Nantahala and *MP&L* forbid the immunity provided by the filed rate doctrine from being applied to a utility which had a legal right to purchase lower-cost supplies elsewhere. Here, ERA expressly stated that it approved the International Contract because of the *flexibility* the contract gave respondent PGT to be "market-responsive," *i.e.*, to purchase from among competing supplies. *Pacific Gas Transmission Co.*, 1 ERA ¶ 70,591 at p. 72,386 (1984) (elimination of minimum purchase obligations in International Contract and flexibility of pricing terms permits the parties to be market-responsive). Thus, Respondents had a legal right to buy lower-cost supplies; under the *Nantahala* exception, its decision to purchase almost exclusively from its high-cost affiliate subjects it to antitrust liability.

CONCLUSION

The Ninth Circuit correctly acknowledged that *Nantahala* left open an important question concerning a utility's energy purchases. *County of Stanislaus*, App. A at 14a. However, the Ninth Circuit's incorrect interpretation of *which* issue was left open resulted in the Ninth Circuit rendering a decision in conflict with all other decisions addressing the applicability of the filed rate doctrine to a utility's purely *voluntary* decision to purchase its energy supplies from one source at above-market prices, notwithstanding the federal agency's approval of other, competitive supplies.[7]

The Court should grant the Petition and issue a writ of certiorari to review the decision of the Ninth Circuit in *County of Stanislaus*.

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7. Respondents contend that no enduring problem is created by the Ninth Circuit's error. This contention is belied by the fact that Respondents sought declaratory relief from the California Public Utility Commission's regulatory overview on the very basis of the Ninth Circuit's decision in *County of Stanislaus*. Moreover, the 1992 amendments to the Natural Gas Act, which compel the entry of *even more* "public interest" findings for imports, have actually exacerbated the problem with the Ninth Circuit's interpretation of such findings as precluding "any challenge." App. A at 13a.

Respectfully submitted,

JOSEPH W. COTCHETT
BRUCE L. SIMON*
COTCHETT & PITRE
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

MICHAEL H. KRAUSNICK
COUNTY OF STANISLAUS
Administration Building
1110 H Street
Modesto, CA 95354
(209) 525-6376

ROGER SCHRIMP
LISA L. GILLISPIE
DAMRELL, NELSON, SCHRIMP,
PALLIOS & LADINE
1601 I Street, Fifth Floor
Modesto, CA 95354
(209) 526-3500

Attorneys for Petitioners

* *Counsel of Record*